Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 89-275

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

COOTER & GELL,

Petitioner,

v.

HARTMARX CORPORATION, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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JOINT APPENDIX

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PETITION FOR CERTIORARI FILED AUGUST 16, 1989
CERTIORARI GRANTED OCTOBER 16, 1989

83pp

TABLE OF CONTENTS

	Page
Relevant Docket Entries	1
Danik Inc.'s Class Action to Secure Injunctive Relief and Recover Treble Damages for Federal Antitrust Violations, Filed November 29, 1983	3
Affidavit of Faye C. Reid, Filed February 27, 1984	16
Affidavit of Nicholas H. Hantzes, Filed February 27, 1984	18
Affidavit of Joseph M. Cahill, Filed February 27, 1984	22
Affidavit of Dale A. Cooter, Filed February 27, 1984	24
Deposition of Manoochehr John Dashtara, Taken February 29, 1984	28
Selected portions of Transcript of Proceedings Taken June 15, 1984; pp. 2 thru 53 and pp. 66 thru 70A	41
October 16, 1989 Order of the Supreme Court of the United States allowing certiorari	81

Note: The following items are contained in the Appendix to the Petition for Writ of Certiorari.

	Page
December 2, 1987 Order of the United States District Court for the District of Columbia, inviting Defendants to submit statement of costs and attorneys' fees. (Cert. Pet. App.)	32a
February 26, 1988 Order of the United States District Court for the District of Columbia for award of sanctions (Cert. Pet. App.)	31a
February 26, 1988 Opinion of the United States District Court for the District of Columbia. (Cert. Pet. App.)	18a
May 19, 1989 Opinion of the United States Court of Appeals for the District of Columbia Circuit. (Cert. Pet. App.)	1a

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-3568

DANIK, INC.,

Plaintiff,

v.

HARTMARX CORPORATION, *et al.*,

Defendants.

RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
1983		
Nov 29	1	COMPLAINT. bl
1984		
Feb 27	21	Affidavits (4) of Faye C. Reid, Nicholas H. Hantzes, Joseph M. Cahill and Dale A. Cooter. (mj)
Mar 14	23	DEPOSITION of Manoochehr John Dashtara taken on 2-29-84 on behalf of defts; Exhibit 1. (signature waived) (dj)
Apr 30	28	NOTICE of pltf to dismiss action without prejudice. (dj)
June 29	29	TRANSCRIPT Of proceedings taken June 15, 1984: pp: 1 thru 70A; (Rep: Harry Deutsch). (mj)
1987		
12/2/87	31	ORDER directing deft to submit to the court a statement of costs and attorneys' fees incurred in the captioned case by 12/11/87. (signed 12/1/87) (N) GASCH, J. (hls)

DATE	NR.	PROCEEDINGS
Feb 29	38	MEMORANDUM (N) (filed 2/26/88) GASCH, J. (hls)
1988		
Feb 29	39	ORDER filed 2/26/88 granting defts' motion for sanctions; directing that the law firm of Cooter & Gell shall forthwith pay to the Hartmarx Corp ($21,452,52) as a sanction for violating FRCP 11; further directing Danik, to forthwith pay to the Hartmarx Corp. ($10,701,26) as sanction for violating FRCP 11 (N) GASCH, J. (hls)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(Title Omitted in Printing)

CLASS ACTION TO SECURE INJUNCTIVE RELIEF AND RECOVER TREBLE DAMAGES FOR FEDERAL ANTITRUST VIOLATIONS

The Plaintiff on behalf of itself and all others similarly situated for their Complaint allege:

JURISDICTION

1. This is a class action seeking damages and injunctive relief for injuries sustained by Plaintiff, and the members of the class it represents, resulting from violations by the Defendants, as hereinafter alleged, of § 1 of the Sherman Antitrust Act (15 U.S.C. § 1), and of § 2 of the Clayton Act as amended by the Robinson-Patman Act, (15 U.S.C. § 13(a) (f)).

2. The jurisdiction of the Court over this action is conferred by §§ 4, 12 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 22 and 26; and by 28 U.S.C. §§ 1331, 1332, and 1337.

3. The amount in controversy exceeds the sum of $10,000.00, exclusive of interest and costs.

PARTIES AND VENUE

4. Danik, Inc. (Danik) is a District of Columbia corporation with its principal place of business at 8133 Watson Street, McLean, Virginia 22101. Danik owns and operates men's clothing stores known as Dash's Designer in the Washington, D.C. Metropolitan Area.

5. Hartmarx Corporation (Hartmarx) is a Delaware corporation with its principal place of business in Chicago, Illinois. Hartmarx is the preeminent source of wearing apparel in the United States. Hartmarx is the parent corporation of three subsidiary men's clothing manufacturers and distributors that are Defendants in this action. Hartmarx is engaged in interstate commerce and transacts business and has substantial contacts in the District of Columbia.

6. Hickey-Freeman Co., Inc. (Hickey-Freeman) is a subsidiary of Hartmarx, is a New York corporation with its principal place of business in Rochester, New York. Hickey-Freeman is a leading manufacturer and distributor of men's suits engaged in interstate commerce and transacts business and has substantial contacts with the District of Columbia.

7. Hart, Schaffner & Marx (Hart, Schaffner & Marx) is a subsidiary of Hartmarx, is a New York corporation with its principal place of business in Chicago, Illinois. Hart, Schaffner & Marx is a leading manufacturer and distributor of men's suits engaged in interstate commerce and transacts business and has substantial contacts in the District of Columbia.

8. Venue is properly laid in the District of Columbia pursuant to 28 U.S.C. § 1391(b) and 15 U.S.C. § 22.

INTERSTATE COMMERCE

9. Upon information and belief, Hartmarx, with a multi-million dollar a year business, systematically acquires, buys and sells goods which it moves in interstate commerce and its activities have a substantial impact on interstate commerce.

10. Upon information and belief, Hartmarx either manufacturers better men's apparel from plants operated by it or by affiliate companies including, but not limited to, Hickey-Freeman and Hart, Schaffner & Marx, which

are located in various states of the United States, and all the goods, including the material used for the production as well as the finished products, flow into interstate commerce.

11. Defendants in turn sell their menswear to numerous retail customers located throughout the United States and such activities are within the flow of interstate commerce and directly and substantially affect such commerce.

DEFINITIONS

12. a. "Metropolitan Area" means Standard Metropolitan Areas as defined by the Bureau of Consensus.

b. "Men's Suits" means menswear consisting of a coat and trousers of matching material (with or without a vest) excluding uniforms.

c. "Men's Better Priced Suits" means men's suits which are normally priced at $50.00 or above at wholesale by the manufacturer.

CLASS ACTION ALLEGATIONS

13. Plaintiff brings this action on behalf of itself, and pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure, as a representative of a class consisting of all men's retail clothing merchants in the United States other than those that are exclusive agents of the Defendants Hart, Schaffner & Marx Corporation and Hickey-Freeman Co., Inc. for the sale of Hart, Schaffner and Marx suits.

14. The class of Plaintiffs is so numerous that joinder of all the members is impractical. Plaintiff is presently unable to state the precise size of the class, which Plaintiff believes numbers in the hundreds. In many instances the retail merchants are unaware that claims on their behalf exist, or are unaware of the facts giving rise to such claims, or having knowledge of such claims, have,

in various instances, sustained damages in such an amount that when taken individually are to small to justify the enormous expense and effort required to sue separately, but whose damages are of such a significant size, if taken as a group, that they justify taking legal action.

15. Common questions of law and fact affect the rights of each member of the class, and common relief by way of damages and final injunctive relief is sought for the class as a whole.

16. The questions of law and fact common to the class which relate to violations of the law alleged herein predominate over any questions which may affect only individual class members.

17. Common questions of law and fact which predominate in this class action include, but are not limited to, the following:

(a) Whether Hart, Schaffner & Marx and Hickey-Freeman and the exclusive retailer agents have engaged in an unlawful conspiracy, combination or agreement to fix prices and eliminate competition in the sale of Hart, Schaffner & Marx and Hickey-Freeman suits and otherwise restrain trade in the sale of better men's suits.

(b) Whether Defendants Hartmarx, Hart, Schaffner & Marx and Hickey-Freeman and the co-conspirators have effectuated the conspiracy or combination by establishing an exclusive retail agent policy and a uniform pricing scheme.

(c) Whether the effect of the Defendants' and co-conspirators' exclusive retailer agent policy and pricing scheme is to fix prices in the sale of Hart, Schaffner & Marx and Hickey-Freeman suits.

(e) Whether the effect of the Defendants' and co-conspirators' exclusive retailer agent policy and pricing is to unreasonably restrain trade between the exclusive agents and the class members in the sale of better priced men's suits.

18. These issues are common to the class because all class members seek to establish the unlawful conspiracy described above through the same facts and documents in possession of the Defendants and co-conspirators. The documents in possession of the Defendants and co-conspirators will prove the existence of a conspiracy among them to eliminate competition or otherwise restrain trade in the sale of Hart, Schaffner & Marx and Hickey-Freeman suits. The documents will also establish that the exclusive retailer agent policy was used in conjunction with the uniform pricing practices of the Defendants to fix and maintain the resale price of Hart, Schaffner & Marx and Hickey-Freeman suits. The class members will seek to prove by the same documents in possession of the Defendants that pursuant to the exclusive retailer agent policy, Defendants will only sell Hart, Schaffner & Marx and Hickey-Freeman better priced men's suits to one retailer on each major metropolitan area in the United States, that the exclusive agent had a restricted territory in which to resell the suits, and that the Defendants boycotted and refused to deal with the class members in order to restrict the number of retailers who would sell the suits. Proof of this all-embracing conspiracy and its general objectives, therefore, will establish the liability of the Defendants for violation of Section 1 of the Sherman Act. Even if proof of the conspiracy itself does not demonstrate that the Defendants and the co-conspirators fixed prices, all class members will rely on the testimony of economic experts to establish that the operation of the exclusive retailer agent policy in conjunction with the uniform pricing practices virtually eliminated competition in the sale of Hart,

Schaffner & Marx and Hickey-Freeman suits. The conspiracy involves the preeminent source of wearing apparel in the United States, two of its subsidiaries that are leading manufacturers and distributors of better men's suits, and certain co-conspirator retailers. All class members will maintain that as a matter of law the existence of a conspiracy involving this group that has the effect of eliminating price competition, restricting retailer sales territory, restricting the number of retailers, and boycotting and refusing to deal with all but a handful of men's clothing retailers in the United States is an unreasonable restraint of trade between the exclusive agents and the class members of the sale of better priced men's suits.

19. The claims of the named Plaintiff herein are typical, in all important respects, of the claims of each and all of the class members and are based upon and arise out of the same facts constituting the Defendants' unlawful conduct. Danik's claims involve the same legal and factual issues that are common to the class and, therefore, as a men's clothing retail merchant, its claim is typical of the claims of all the class members. In particular, Danik seeks to establish that the Defendants and the co-conspirators conspired to fix prices and eliminate competition in the sale of Hart, Schaffner & Marx and Hickey-Freeman suits or otherwise unreasonably restrain trade between the class members and the exclusive retail agents in the sale of better men's suits. Furthermore, Danik seeks to establish that the conspiracy was effectuated by the exclusive retail agent policy and uniform pricing scheme developed by the Defendants and the co-conspirators. Pursuant to the terms of the exclusive agent policy, Danik will seek to prove that the Defendants could not permit Danik to purchase Hart, Schaffner & Marx and Hickey-Freeman suits or otherwise compete with the exclusive agents in the sale of Hart, Schaffner & Marx and Hickey-Freeman suits. In

other words, Danik and the other class members as a group, were denied the opportunity to purchase Hart, Schaffner & Marx and Hickey-Freeman suits and thereby denied the opportunity to compete with the exclusive agents. Upon proving the existence of the conspiracy and purpose, Danik will seek the same relief as sought by the other class members for injury caused by the unlawful conspiracy and restrain of trade, enjoining the Defendants and co-conspirators from pursuing said policies and recovering damages for lost profits of the sales. The claims of Danik are, therefore, not only typical of, but identical to the other claims of the class of which it is a member.

20. The Plaintiff will fairly and adequately represent the interest of the class and the individual class members because, by reason of the similarity of the claims of the Plaintiff and the individual class members, the successful assertion of the Plaintiffs' claim herein will necessarily establish determinations of fact and law adequate to prove the liability of the Defendants to each class member. In particular, successful assertion of the named Plaintiff's claim will establish that the Defendants and their exclusive agents have unlawfully conspired among themselves in restraint of trade to create an exclusive agent retailer policy and pricing scheme that enables the Defendants and its co-conspirators to fix the price of Hart, Schaffner & Marx and Hickey-Freeman suits and refuses to deal with any of the class members and thereby eliminates competition in the sale of Hart, Schaffner & Marx and Hickey-Freeman suits and unreasonably restrains trade in the sale of better priced men's suits. Danik's interests are co-extensive with those of the class as are each class member's to the other class members. Although all the members of Plaintiff's class are competitors in the sale of men's suits, as to the class claims they seek the common relief of eliminating price fixing and the other unreasonable restraints of trade that accompany the exclusive retailer agent policy and uniform pricing scheme of the

Defendants and co-conspirators. Furthermore, Plaintiff is represented by skilled and experienced attorneys who will fairly and adequately represent the interest of the absent members of the class.

21. Class actions are superior to other available methods for fair and efficient adjudication of this controversy against the Defendants. In particular, the class action will promote economies of time, effort and expense and will avoid a multiplicity of actions and delay in securing the class members' legitimately claimed relief of elimination of price fixing and other unreasonable restraints of trade in the men's retail clothing industry.

VIOLATIONS ALLEGED

22. Upon information and belief, Hart, Schaffner & Marx is registered with the United States Patent Office, Trademark Division, and is the trademark owner of one or more trademarks consisting of the name Hart, Schaffner, & Marx.

23. Upon information and belief, Hickey-Freeman is registered with the United States Patent Office, Trademark Division, and is the trademark owner of one or more trademarks consisting of the name Hickey-Freeman.

24. Hartmarx has combined, conspired and agreed with its subsidiaries Hart, Schaffner and Marx and Hickey-Freeman to engage in the above enumerated unlawful acts and practices.

25. Defendants at all times relevant have and still do heavily promote their trademark items bearing the trademark name Hart, Schaffner & Marx and Hickey-Freeman and widely advertise those trademarks.

26. Defendants sell their Hart, Schaffner & Marx and Hickey-Freeman men's suits to various retail stores located throughout the United States and upon information and belief, as part of their sales and promotion program,

vigorously adhere to what is known as an exclusive retailer agent policy whereby Defendants will only sell Hart, Schaffner & Marx and Hickey-Freeman men's suits to one retailer in each major metropolitan area in the United States, including the Washington, D.C. Metropolitan Area. Upon information and belief, either as a condition of the exclusive retailer status or by agreement with the retailer, Hart, Schaffner & Marx and Hickey-Freeman men's suits are sold by the retailer at the Defendants' suggested retail price or at an artificially high price.

27. In addition, upon information and belief, for several years continuing to the present time, Hartmarx, Hart, Schtffner & Marx, Hickey-Freeman, and the other exclusive retailer agent co-conspirators have combined, conspired and agreed with one another to fix prices and eliminate competition in the sale of Hart, Schaffner & Marx and Hickey-Freeman suits and to otherwise restrain trade in the sale of better men's suits.

28. By virtue of the exclusive agent policy, Defendants and the co-conspirator retailers have engaged in combinations, conspiracies and agreements that include the following unlawful acts and practices:

a. Defendants and the co-conspirators have determined, fixed and maintained prices at which to sell Hart, Schaffner & Marx and Hickey-Freeman men's suits;

b. Defendants and the co-conspirators have restricted the territory in which exclusive agent retailers of Hart, Schaffner & Marx and Hickey-Freeman suits may sell such men's suits;

c. Defendants and the co-conspirators have restricted the number of retailers that may sell Hart, Schaffner & Marx and Hickey-Freeman suits;

d. Defendants, in combination, conspiracy and agreement with the co-conspirators have boycotted and refused to deal with Danik in order to eliminate Danik as a com-

petitor and to enforce the policies and practices of fixing and maintaining prices and restricting territories.

29. Danik has for the last several years attempted to place orders with the Defendants for their Hart, Schaffner & Marx and Hickey-Freeman suits and Defendants have continuously refused to acept the order of Danik for Hart, Schaffner & Marx and Hickey-Freeman suits.

30. This price fixing policy is being maintained with the implicit or explicit understanding and agreement of the exclusive agent retailers of Hart, Schaffner & Marx and Hickey-Freeman suits which are in direct competition with Danik with the effect and result that a uniform barrier is being erected to retail price competition.

31. By the foregoing policy, Defendants are compelling agreement between them and their exclusive agents to fix and maintain the resale price of Defendants' products bearing the Hart, Schaffner & Marx and Hickey-Freeman trademark and are further perpetuating a trademark monopoly as a consequence thereof and directly impacting upon interstate commerce.

32. Hartmarx, as the preeminent source of quality wearing apparel in the United States, and as a consequence of the popularity of the Hart, Schaffner & Marx and Hickey-Freeman trademark merchandise, and as a further consequence of the utilization of its trademark monopoly, Defendants have acquired, as far as the Hart, Schaffner & Marx and Hickey-Freeman suits are concerned, a unique position with no real competitive alternative in the retail sales industry of men's better suits.

33. The Defendants' conspiracy with their retail store exclusive agents to fix the retail price of Hart, Schaffner & Marx and Hickey-Freeman suits *has caused*, among other things, the following unlawful *effects*, which as a conspiracy was designed to accomplish:

a. The resale prices of Hart, Schaffner & Marx and Hickey-Freeman suits have been fixed and maintained in an arbitrary and non-competitive level;

b. The territory in which the retail store exclusive agents of the Defendants may resell Hart, Schaffner & Marx and Hickey-Freeman better men's suits has been restricted;

c. The number of retail merchants selling Hart, Schaffner & Marx and Hickey-Freeman suits has been restricted to one in each major metropolitan area with the direct result that competition in the sale of Hart, Schaffner & Marx and Hickey-Freeman suits in the major metropolitan areas in the United States has been restricted;

d. Purchasers of Hart, Schaffner & Marx and Hickey-Freeman suits have been denied the opportunity of choosing other retailers and from purchasing at competitive prices;

e. Price and other forms of competition have been eliminated or substantially reduced in the sale of Hart, Schaffner & Marx and Hickey-Freeman suits generally and between all retail stores engaged in the sale of Hart, Schaffner & Marx and Hickey-Freeman suits;

f. Danik and other competitive retailers have been prevented and excluded from selling Hart, Schaffner & Marx and Hickey-Freeman suits since their principal means of breaking into the market is price competition.

34. The foregoing combinations, conspiracies and agreements in the acts and practices pursuant thereto of Defendants and the co-conspirators were and are in restraint of trade or commerce among the several states in violation of § 1 of the Sherman Act (15 U.S.C. § 1).

35. As a result of the unlawful combinations, conspiracies, agreements, acts and practices alleged against Defendants and the co-conspirators herein constituting a violation of § 1 of the Sherman Act, Danik has been irreparably injured in its business in the form of lost profits and sales, and its business and property have been destroyed.

WHEREFORE, Danik demands:

a. That this Court adjudge and decree that the acts of the Defendants as hereinabove described have been and continue to be in violation of the antitrust law, including § 1 of the Sherman Antitrust Act and that, therefore, all contracts made between the Defendants and the co-conspirators in violation of the antitrust laws are void and have no effect;

b. That a Temporary Restraining Order and Preliminary Injunction be issued out of this Court upon its Order directing the Defendants, its present and future officers, directors, employees, agents, successors and assignees to refrain from entering into, adhering to, renewing, maintaining or furthering, directly or indirectly, any like or similar combination or restraint of a sale of men's wear herein alleged, and that after a trial of this cause, that said injunction be perpetual.

c. For a decree ascertaining the damages suffered by Danik by reason of the unlawful acts of the Defendants herein complained of, and awarding judgment in favor of Danik and against the Defendants for treble the amount of said damages together with Danik's reasonable attorney's fees and all costs and disbursements of this action.

d. For such other and further different relief which to the Court may seem necessary and appropriate.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(Title Omitted in Printing)

AFFIDAVIT

M. John Dashtara, President and Treasurer of Danik, Inc., being duly sworn according to law, hereby deposes and says that the facts set forth in the foregoing Complaint are true and correct to the best of his knowledge, information and/or belief.

/s/ M. John Dashtara
M. JOHN DASHTARA

(Jurat Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(Title Omitted in Printing)

AFFIDAVIT OF FAYE C. REID

I, Faye C. Reid, under penalty of perjury, hereby depose and say as follows:

1. I am over the age of 18 and I am competent to testify to the following on personal knowledge.

2. I am employed as a secretary at Cooter & Gell, which law firm represents Danik, Inc. in the instant law suit.

3. On or about November 4, 1983, at the request of Joseph Cahill, an attorney at Cooter & Gell, I telephoned a number of clothing stores in the Washington, D.C. metropolitan area which I know sell men's suits and sportcoats to inquire as to whether they sell Hart Schaffner & Marx suits. I spoke with salespeople at Arthur Adler, Britches of Georgetown, Brooks Brothers, Garfinkel's, Lewis & Thos. Saltz, Bloomingdale's, Woodward & Lothrup, and Hecht's, all of whom told me that they did not carry the Hart Schaffner & Marx brand. The salespeople I spoke to at Bloomingdale's and Woodward & Lothrup added that Raleigh's was the only store they knew of that carried that line in the Washington, D.C. area. When I called Sym's Inc., their reply was that they could not discuss manufacturers over the telephone. I spoke to a gentleman named Sid at Raleigh's in the men's department who told me that Raleigh's was the exclusive dealer of Hart Schaffner & Marx suits in the Washington, D.C. area.

4. I then placed calls to Bloomingdale's, Sak's Fifth Avenue and Paul Stewart's in New York City, and was told by salespeople at each of those stores that they did not carry the Hart Schaffner & Marx line. The person I spoke with at Paul Stewart's said that Wallach's was the only store that he knew of in New York City that carried that line. When I called Wallach's, the salesman told me "we practically are Hart Schaffner & Marx".

5. I placed calls to Today's Man, Wanamaker's, Jacob Reed's Sons, and Strawburg's in Philadelphia. Ed Gallagher at Wanamaker's confirmed that Wanamaker's carried Hart Schaffner & Marx, and when asked if he knew of any other store in Philadelphia which sold that line, he said that he thought Strawburg's might. The salespeople at Today's Man and Strawburg's told me that they did not carry Hart Schaffner & Marx suits, and I found upon calling Jacob Reed's Sons that they were no longer in business in Philadelphia.

/s/ Faye C. Reid
FAYE C. REID

(Jurat Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(Title Omitted in Printing)

AFFIDAVIT OF NICHOLAS H. HANTZES

I, Nicholas H. Hantzes, under penalty of perjury, hereby depose and say as follows:

1. I am over the age of 18 and I am competent to testify to the following on personal knowledge.

2. I am an attorney at the law firm of Cooter & Gell, and in that capacity I have represented Danik, Inc. in the instant action, as well as in other litigation pending between Danik, Inc. and affiliates of the Defendants herein.

3. On or after February 2, 1984, after being served with and reviewing Defendants' Motion For Sanctions Pursuant To Rule 11 filed herein, I began to investigate the factual basis for Defendants' claim that they did not engage in an exclusive retailer agent policy as to the sale of Hart Schaffner & Marx and Hickey-Freeman suits, as Danik had alleged in its Complaint herein. To begin with, I went to a local library and reviewed telephone directory yellow pages for a number of cities, looking at listings under the hearing "Men's Clothing And Furnishings-Retail". I was looking for listings and advertisements by stores which claimed to carry Hickey-Freeman and Hart Schaffner & Marx suits. I found in several cities, notably Philadelphia and Detroit, that the only store listings which mentioned Hickey-Freeman also claimed in their advertisement to be the exclusive agent for Hickey-Freeman clothing. In many cities there was a sub-heading called "Hart Schaffner & Marx" or

"Hickey-Freeman", under which there was only one retailer listed, generally with several locations in that area. Perusal of the Hartmarx prospectus revealed that many of the stores listed in this manner are wholly owned Hartmarx subsidiaries. The Los Angeles area yellow pages were representative of what I found in many of these cities: there is a specific listing for Hart Schaffner & Marx clothing, under which the only retailer listed is Silverwood's, a wholly owned subsidiary of Hartmarx. Another store, Eagleson's, advertised that it carries Hart Schaffner & Marx in big and tall sizes. No other stores in the Los Angeles area mentioned the names Hart Schaffner & Marx or Hickey-Freeman in their advertisements.

4. I subsequently placed telephone calls to stores in cities listed in the affidavits attached to Defendants' Motion For Sanctions in which the Defendants claim to sell the Hart Schaffner & Marx and Hickey-Freeman lines to a number of retailers. In Philadelphia I telephoned Jacob Reed's Sons, a store which advertised in the yellow pages that it was the exclusive agent of Hickey-Freeman clothing, and learned from that telephone call that Jacob Reed's Sons had gone bankrupt and was out of business. I subsequently spoke to a salesman at Boyd's in Philadelphia and was advised that Boyd's was the only retailer in Philadelphia which sold Hickey-Freeman suits since Jacob Reed's had gone out of business. Boyd's does not sell Hart Schaffner & Marx suits. Despite the Boyd's salesman's representations, I determined that Wanamaker's in Philadelphia sells Hickey-Freeman suits and also that it sells Hart Schaffner & Marx suits. I was not able to find any other retailer in Philadelphia which sells these lines.

5. Upon calling a number of retailers in Boston, in which city Hickey-Freeman allegedly sells to four retailers and Hart Schaffner & Marx allegedly sells to sixteen retailers, I found only one store which claimed to carry

a full selection of Hart Schaffner & Marx and Hickey-Freeman suits, that being Wallach's, a Hartmarx subsidiary. A salesman in a Boston Department store, Jordan Marsh, stated that it sells only a limited selection of Hart Schaffner & Marx clothing and that Wallach's had a much broader selection. The only other store in Boston which I could determine sells Hart Schaffner & Marx suits is a big and tall men's clothing store called Hajjars.

6. Based upon the listings in the Los Angeles pages under Hart Schaffner & Marx, I telephoned Silverwood's, a wholly owned subsidiary of Hartmarx, to inquire of their salesmen whether they knew of any other stores in the Los Angeles area which carried Hart Schaffner & Marx suits. I was told by a salesman there that in the Western states, including Utah, Idaho and California, Hart Schaffner & Marx suits could only be purchased from retailers which are Hartmarx subsidiaries.

7. The pattern which became apparent to me from my investigation is one wherein most major metropolitan areas contain one major retailer which carries a full selection of either or both Hart Schaffner & Marx and Hickey-Freeman suits. All other retailers in that area carry only a very limited selection of these lines, often in only special sizes, such as big and tall, if they carry these labels at all. Where there is more than one retailer offering a broad selection of these lines in one area they are generally both (or all) wholly owned Hartmarx subsidiaries. Alternatively, if there are two retailers in the same city selling these lines, one will offer Hickey-Freeman and the other will offer Hart Schaffner & Marx, or one will carry both and the other will carry only one of the two labels, as is the case in Philadelphia. In any event, the lines are sold, throughout the United States, in such a way as to keep competition in the sale of these lines to a minimum. In addition, very few retailers which are not Hartmarx subsidiaries, or which are not exclusive

Hart Schaffner & Marx or Hickey-Freeman agents are able to sell these suits to their customers, thereby limiting their ability to compete against the few stores in their area which do carry these lines.

/s/ Nicholas H. Hantzes
NICHOLAS H. HANTZES

(Jurat Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(Title omitted in printing)

AFFIDAVIT OF JOSEPH M. CAHILL

I, Joseph M. Cahill, under penalty of perjury, hereby depose and say as follows:

1. I am over the age of 18 and I am competent to testify to the following on personal knowledge.

2. I am an attorney at the law firm of Cooter & Gell, and in that capacity I have represented Danik, Inc. in the instant action, as well as in other litigation pending between Danik, Inc. and affiliates of the Defendants herein.

3. On or about November 4, 1983, I initiated an investigation by employees of this firm as to the truth of information received from principals of our client, Danik, Inc., that Hart Schaffner & Marx and Hickey-Freeman suits were sold by only one retailer in the Washington, D.C. area, and in most other major metropolitan areas. I was aware that Raleigh's, a Washington, D.C. area retailer, advertised regularly that it was the exclusive agent for Hart Schaffner & Marx suits in this area, and I was also aware that Danik, Inc. had been unable, despite their efforts, to purchase Hart Schaffner & Marx and Hickey-Freeman label suits from subsidiaries of the Hartmarx Corporation. To verify our client's claim of an exclusive dealership arrangement, I asked Faye Reid, a secretary at this firm, to telephone the better known clothing retailer in the Washington, D.C. area to inquire of them whether they sold Hart Schaffner & Marx suits, and if not, whether they knew who did.

4. Mrs. Reid's efforts revealed that not one retailer besides Raleigh's appeared to sell Hart Schaffner & Marx suits in the Washington, D.C. area. (See Affidavit of Faye C. Reid) Based upon this information I then telephoned a number of clothing retailers in the Baltimore area to see if there was also only one retailer in Baltimore selling Hart Schaffner & Marx suits. I called Hamburger's, which I know to be a popular menswear store in Baltimore, and was told that they did carry Hart Schaffner & Marx. When asked if he knew of any other store in Baltimore which sold Hart Schaffner & Marx suits, the salesman I spoke to told me that he did not know of any others. I then called several other Balitmore menswear stores and was told that they did not carry those lines.

5. Having determined to my satisfaction that the Washington, D.C. and Baltimore areas each contained only one retailer of a significant size–which sells Hart Schaffner & Marx suits, I asked Mrs. Reid to telephone a number of retailers in Philadelphia and New York, N.Y. which I thought would be likely to sell Hart Schaffner & Marx and Hickey-Freeman suits, to determine if the exclusive retailer pattern I found in the Baltimore and Washington, D.C. areas extended to those metropolitan areas. Mrs. Reid's telephone calls revealed again that there appeared to be only one major retailer in each Philadelphia and New York, N.Y. selling Hart Schaffner & Marx suits. (See Affidavit of Faye C. Reid)

6. Based upon our investigation as described above and upon the information received from our client, I believed to the best of my knowledge and information, at the time I signed the Complaint herein that there was good ground to support the allegations contained therein.

/s/ Joseph M. Cahill
JOSEPH M. CAHILL

(Jurat Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(Title Omitted in Printing)

AFFIDAVIT OF DALE A. COOTER

I, Dale A. Cooter, under penalty of perjury, hereby depose and say as follows:

1. That I am over the age of 18 and that I am competent to testify to the following on personal knowledge.

2. That I am a partner at the law firm of Cooter & Gell, and in this capacity I have represented the Plaintiff herein, Danik, Inc., in a number of lawsuits involving the Defendants and several additional subsidiaries and affiliates of the Defendants herein.

3. One of the subsidiaries of Hartmarx, Intercontinental Apparel, Inc., (Intercontinental), filed an action in 1983 against Danik and its president, Manoochehr John Dashtara, for the recovery of approximately $108,000.00 claimed to be due and owing to Intercontinental for the sale of menswear to Danik for the Spring 1982 season. Prior to the institution of that action and early in the attorney-client relationship between my firm and Danik, the principals of Danik approached me and explained that they felt they had a valid price discrimination claim against Intercontinental which justified the withholding of the monies claimed to be due and owing Intercontinental. Shortly thereafter, Intercontinental sued Danik for the $108,000.00 and we filed a Counterclaim on Danik's behalf alleging Robinson-Patman price discrimination.

4. As we became better acquainted with the business of Danik and with the business of Intercontinental, Hartmarx Corporation and other Hartmarx subsidiaries with which Danik had dealt, we were advised by our clients that they had over the years attempted to purchase the Hart Schaffner & Marx and Hickey-Freeman lines of menswear, manufactured by subsidiaries of Hartmarx, which lines were superior to those Danik had previously purchased from Intercontinental, and that these attempts had been completely unsuccessful. We were advised that Hart Schaffner & Marx and Hickey-Freeman Company chose to sell its lines of better men's suits to only a few select retailer, and that in the Washington Metropolitan Area it refused to sell these lines to any retailer other than Raleighs.

5. As discovery progressed in the underlying collection case, it became clear to me that the business of Danik had been damaged not only by Intercontinental's price discrimination, but that it had also been injured as a result of price discrimination on the part of other Hartmarx subsidiaries with which Danik had dealt, and by a conspiracy between Intercontinental and those subsidiaries whereby they agreed to stop doing business with Danik. In addition, the Danik principals insisted that they were unable to effectively compete against Raleighs because Raleighs was able to buy the Hart Schaffner & Marx and Hickey-Freeman lines of better menswear from subsidiaries of Hartmarx which Danik was not able to purchase.

6. Based upon our belief that the same price discrimination was being practiced by the other Hartmarx subsidiaries with which Danik had dealt and that there was a conspiracy between the subsidiaries and Intercontinental to cease doing business with Danik, we filed on Danik's behalf an Amended Counterclaim in the underlying collection suit which added several defendants and a Sherman Act conspiracy claim. In addition, as counsel for Dan[illegible] we determined that these facts also formed the basis for a class action on behalf of similarly situated

retailers against Intercontinental, the other subsidiaries, and against Syms, Inc., the retailer receiving the benefit of the price discrimination. At the same time, we recognized that, if the principals of Danik were correct in their assertions that the Hart Schaffner & Marx and Hickey-Freeman lines were sold only to one retailer in the Washington, D.C. area, to the exclusion of all others, there existed a basis for a federal antitrust action against the Defendants herein for resale price maintenance. However, it was determined that if such practice were in place, not only was Danik a party injured by such a practice, but all other retailers similarly situated were also victims of this practice. It was at this point that I directed other attorneys in the law firm of Cooter & Gell to institute an investigation to determine whether, in fact, Raleigh's was the only retailer in the Washington, D.C. area selling the Hart Schaffner & Marx and Hickey-Freeman labels, and whether such an exclusive retailer agent policy existed in other major metropolitan areas.

6. The information which was obtained from the investigation made by my firm, which is outlined in the Affidavits of Faye C. Reid, Nicholas Hantzes and Joseph M. Cahill, filed herewith, was presented to me. Based upon this information I believed, to the best of my knowledge and information, at the time I signed the Complaint, that there was good ground to support the allegations therein.

7. Subsequently, Complaints were prepared for the instant lawsuit and for the related class action. Prior to my filing these Complaints, I scheduled a meeting with counsel for Intercontinental in the underlying collection suit wherein I presented counsel with draft copies of those Complaints and outlined a settlement offer which encompassed the collection suit and the two class actions. I made clear at that meeting and in subsequent conversations with counsel for the Defendants, that it was not my intention to simply "wash out" the collection with my forebearance in filing these class actions. I stated to counsel that I felt that Defendants faced more exposure from these class actions than did my client in the underlying collection suit, and that it was my intention to give Defendants an opportunity to consider settlement of the class action suits prior to the certification of the class actions, after which time I would no longer be able to engage in settlement discussions on my client's behalf alone. At no time was it my intention to threaten the Defendants with the filing of the class actions solely for the purpose of having the underlying collection suit dismissed or otherwise for harrassment purposes.

/s/ Dale A. Cooter
DALE A. COOTER

(Jurat Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(Title Omitted in Printing)

Washington, D.C.

Wednesday, February 29, 1984

DEPOSITION OF MANOOCHEHR JOHN DASHTARA

• • • •

[3] PROCEEDINGS

Thereupon,

MANOOCHERR JOHN DASHTARA,

a witness, was called for examination by counsel for the defendant and, after being duly sworn by the notary public, was examined and testified as follows:

EXAMINATION BY COUNSEL
FOR THE DEFENDANT

BY MR. FAVRETTO:

Q Would you state your name, please, sir.
A Manoochehr John Dashtara.
Q What is your occupation?
A I am president of Danik, Inc., trading as Dash's Designer.
Q How long have you had that position?
A Since 1969.
Q In what business is that? What does that involve?
A It's men's clothing.
Q How long have you been in that business?
A Since 1969.

Q At what location?
A At Georgetown. I had four locations between 1969 to now, and at present I have five locations, which—one [4] is in Tyson's Corner, Virginia. One is on Rockville Pike, Maryland. One is at 19th Street, N.W., and one is at 3229 M Street, Georgetown, and one at 1309 F Street, Washington, D.C.
Q Have you always traded under the name of Dash's Designer since 1969?
A No, we did not.
Q What did you start as in 1969?
A In 1969 we started as Generation Gap, and then later on—later—a few years later we started Dash's.
Q Has your men's wear business always been conducted in the Washington, D.C. area?
A Yes.
Q What did you do prior to 1969?
A Around 1969 I came to this country, and I was going to go to college, which I didn't, and I started to work then. I started Dash's in 1969.
Q Have you ever done business in the men's wear industry in any location besides Washington, D.C.?
A No.

MR. FAVRETTO: I would like to identify as an exhibit a multipage document entitled, "Class Action to [5] Secure Injunctive Relief and Recover Trouble Damage for Federal Antitrust Violations." It has attached to it as the last page a single-page document entitled, "Affidavit," and I'd like to mark that as Dashtara Exhibit Number 1 for identification.

(Dashtara Deposition Exhibit Number 1, a copy of a document, was marked for identification and attached to the court copy of this deposition.)

MR. COOTER: I want to go off the record just for a moment.

(Discussion off the record.)

BY MR. FAVRETTO:

Q Mr. Dashtara, I will hand you a copy of Deposition Exhibit 1, and I have also given a copy of the exhibit to counsel. Do you have it in front of you, sir?

A Yes.

Q Are you familiar with this document?

A No. What is that?

MR. COOTER: This is the Complaint that we filed against Hartmarx. You are familiar with it, generally, aren't you?

THE WITNESS: Yes.

[6] BY MR. FAVRETTO:

Q It is true, is it not, that this is the Complaint that was filed against Hartmarx, Hickey-Freeman and Hart, Schaffner and Marx—

A Yes.

Q —in this action?

A Yes.

MR. COOTER: I take your representation for that. I assume it's true.

BY MR. FAVRETTO:

Q I refer you to the—

MR. COOTER: We will stipulate that he signed the affidavit on the back.

BY MR. FAVRETTO:

Q That is the last page that you are referring to?

A Yes.

Q That is your signature?

A Yes, it is.

MR. FAVRETTO: Could we break for a second.

(Discussion off the record.)

MR. FAVRETTO: Back on the record.

BY MR. FAVRETTO:

[7] Q Mr. Dashtara, have you read the document?

A I don't remember. I mean, I signed the document. I will have to read it again to refresh my memory.

Q Do you recall whether you have ever read it at one time or another?

A I signed several documents, which I don't know which one is which.

Q Mr. Dashtara, I'd like to call your attention to the last page, which is entitled, "Affidavit."

A Yes. I said I signed it.

Q You signed that affidavit?

A That's correct.

Q The affidavit says, "M. John Dashtara, president and treasurer of Danik, Inc., being duly sworn according to law, hereby deposes and says that the facts set forth in the foregoing Complaint"—

A Yes.

Q That's this document, which precedes the affidavit —"are true and correct, to the best of his knowledge, information and/or belief."

A Yes.

Q Is that what it says?

[8] A Yes.

Q I ask you again, before signing this affidavit on November 21, 1983, did you have occasion to read the Complaint or otherwise review it in any manner?

A Yes, I did.

Q Could you describe the nature of that review?

A What do you mean by that?

Q Did you read the Complaint yourself?

A No. Someone did read it to me.

Q Who read that to you?

A Mercedes—my sister-in-law. She read it to me, and I signed it.

Q Did she read every part of it to you?

A I believe so.

Q She read it to you on or before the 21st day of November 1983?

A Yes.

Q Could you identify your sister-in-law for us, please? What is her name?

A Mercedes Dashtara.

MR. COOTER: More properly, I think it's legally Mercedes Dash.

[9] THE WITNESS: Mercedes Dash.

BY MR. FAVRETTO:

Q Is she an employee of the company?

A Yes, she is.

Q What is her title in the company?

A She's our secretary in the company.

Q Is that an officership?

A No.

MR. COOTER: She is a secretary in the office of the company.

THE WITNESS: Right.

MR. COOTER: That's a fair rendition.

BY MR. FAVRETTO:

Q Mr. Dashtara, I'd like to call your attention to paragraph 26 of Deposition Exhibit Number 1.

A Right.

MR. COOTER: Off the record.

(Discussion off the record.)

MR. FAVRETTO: I would like the record to reflect that counsel for the witness has just read to him paragraph 26 in Deposition Exhibit Number 1.

BY MR. FAVRETTO:

[10] Q Mr. Dashtara, do you understand what counsel has just read to you?

A Yes, I do.

Q I would like to call your attention specifically to that part of the paragraph which states, in the first sentence which states that, and I quote, "Defendants sell their Hart, Schaffner and Marx and Hickey-Freeman men's suits to various retail stores located throughout the United States, and, upon information and belief, as part of their sales and promotion program, vigorously adhere to what is known as an exclusive retailer agent policy whereby defendants will only sell Hart, Schaffner and Marx and Hickey-Freeman men's suits to one retailer in each major metropolitan area in the United States, including the Washington, D.C. metropolitan area." I ask you, Mr. Dashtara, what is the basis for your belief that this was true and correct, as written?

MR. COOTER: Listen to me, Mr. Dashtara. You may answer that question if you had information other than what you received from counsel. You may not tell Mr. Favretto what conversations you had with either myself or with any other person associated with my law firm, so if the basis of [11] your information is what we told you, then you may not answer that question. Do you understand?

THE WITNESS: Yes.

MR. COOTER: Do you have any other information, other than what we told you?

THE WITNESS: No.

MR. COOTER: Then you may not answer that question.

BY MR. FAVRETTO:

Q Mr. Dashtara, did you conduct any independent investigation to determine whether or not the statements, particularly those statements I just read to you in paragraph 26 of the Complaint, were well grounded in fact?

MR. COOTER: Do I take it by "independent" you mean other than that conducted by his counsel?

MR. FAVRETTO: On his own. That's correct.

MR. COOTER: Other than what we did.
THE WITNESS: No, I did not.

BY MR. FAVRETTO:

Q Do you have any independent basis for stating that this statement is true and correct, other than what counsel told you?
MR. COOTER: Other than what we told you.
[12] THE WITNESS: No, I don't know any.

BY MR. FAVRETTO:

Q Did you say you do not know anything else, other than what counsel told you about this assertion in the Complaint?
A That is correct.
Q When you signed the affidavit which we read earlier in this deposition which states that, "The facts set forth in the foregoing Complaint are true and correct to the best of your information and/or belief"—
A Yes.
Q —you did not have any knowledge, information or belief that was independent of what counsel told you; is that correct?
A I know—I mean, from my counsel, which is—
MR. COOTER: You may not tell him what I told you, is the long and short of it. Just tell him yes or no. Did you know anything other than what we told you?
THE WITNESS: No.
MR. COOTER: He trusts us, as well he should. Having gone through this futile exercise, Mr. Favretto, in your moving papers somewhere pursuant to Rule 11 you [13] indicated that you would be happy to depose Mr. Dashtara or myself or other representative of my law firm with respect to what independent investigation we made prior to the filing of the Complaint to determine whether or not we could file it in a good faith belief that it was true. I will be happy to submit myself or

other member of my law firm for deposition for that limited purpose without in any fashion waiving any attorney-client privilege or without in any fashion suggesting that I am a proper witness in this case. If you want to do that, I will be happy to give you all the information you want. Obviously, Mr. Dashtara, as you know from the response to Rule 11, didn't make the investigation. We did, and now it's crystalline.
MR. FAVRETTO: Mr. Cooter, I appreciate your offer. This is Mr. Dashtara's deposition, and we are going to proceed.
MR. COOTER: You can ask him whatever you want. I am just suggesting to you that, as a practical matter, he said what he said, and the facts are fairly obvious, and if you wish to proceed, we will be happy to sit here, but he is not to disclose privileged information.
MR. FAVRETTO: I understand what you are saying, [14] but I find it to be a peculiar situation when a principal of a firm verifies a Complaint as true and correct and then has absolutely no independent basis for the truth of the allegations made in the Complaint.
MR. COOTER: Mr. Favretto, I have been a litigator for a long time, and my experience is it is not in any fashion peculiar, depending on the allegations.

(Discussion off the record.)

BY MR. FAVRETTO:

Q Mr. Dashtara, what lawyers at Mr. Cooter's law firm advised you about these allegations sufficient to allow you to form a belief that they were true and correct?
A Mr. Cooter. Mr. Cooter is the attorney I'm dealing with. I believe him.
Q Did you have any discussions with any other lawyers at Mr. Cooter's firm?
A No.
MR. COOTER: Well—
THE WITNESS: I mean I had—

MR. COOTER: You may answer that yes or no. You may not tell him what we talked about. Have you ever talked to any lawyers, other than me, at my law firm?
[15] THE WITNESS: Yes.

BY MR. FAVRETTO:

Q Did you talk to any lawyers, other than Mr. Cooter, about the allegations in this Complaint?

MR. COOTER: You may not testify as to substance of questions. I instruct you not to answer. You can ask him who he talked to. You can't ask him what we talked about.

MR. FAVRETTO: I asked him, Mr. Cooter, whether he talked to any other lawyers at your firm about the allegations in this Complaint. That's the question.

MR. COOTER: Fine. I instruct you not answer. It seems to me that it goes to the substance of the conversation. I have already offered to make our lawyers available to you, sir. I instruct him not to answer.

MR. FAVRETTO: On what grounds? May I ask?

MR. COOTER: Privilege.

MR. FAVRETTO: I am asking for the identity of the lawyer with whom Mr. Dashtara discussed the allegations in this Complaint to which he subscribed his name.

MR. COOTER: You may ask him, Mr. Favretto, who in my law firm he talked to about any specific subject matter. As you [16] know, this is one of several lawsuits. If you want to ask him that, I will let him answer it. If you want to ask him what we talked about or a question which leads to what he talked about, I will instruct him not to answer.

MR. FAVRETTO: Mr. Cooter, I would just not want to prolong this, but I would ask you to reflect upon your position. Mr. Dashtara has just told me that the sum and substance of his information and belief is derived from counsel. I have asked him what counsel. He has said you, and then I have asked him who else, and he won't answer.

MR. COOTER: Mr. Favretto, I suggest you reflect on your position. I have offered to make the lawyers available who have firsthand knowledge with respect to the inquiry made. Just because his knowledge is derivative from the law firm does not mean that he is required to disclose privileged conversations between himself and counsel, nor will I allow him to. I instruct him not to answer. I would be happy, pursuant to your papers, to give you people who can answer your inquiry.

MR. FAVRETTO: So that you absolutely understand—

MR. COOTER: It is clear.

MR. FAVRETTO: —what I am asking—

[17] MR. COOTER: I understand.

MR. FAVRETTO: I am just asking for the name of the lawyer at your firm who gave Mr. Dashtara sufficient information for him to form a belief that the data in this Complaint is true and the allegations were true.

MR. COOTER: To that he has answered me. It is me on whom he relied. That is what he said, and that is the extent of your inquiry.

MR. FAVRETTO: Was there anyone else upon whom he relied at your firm?

MR. COOTER: That is a different question.

BY MR. FAVRETTO:

Q Mr. Dashtara, was there anyone else at Mr. Cooter's law firm upon whom you relied?

A No. It was Mr. Cooter.

Q Let me make sure you understand the question. Was there anyone else at the law firm upon whom you relied to form your belief as to the truth of the allegations in this Complaint?

A That was Mr. Cooter, I said.

Q It was only Mr. Cooter; is that correct?

A Yes.

[18] MR. FAVRETTO: Can we have a short recess?

(Discussion off the record.)

MR. FAVRETTO: Back on the record.

BY MR. FAVRETTO:

Q Mr. Dashtara, I would like to read to you the second sentence of paragraph 26 in Deposition Exhibit Number 1, and I quote, "Upon information and belief, either as a condition of the exclusive retailer status or by agreement with the retailer, Hart, Schaffner and Marx and Hickey-Freeman men's suits are sold by the retailer at the defendant's suggested retail price or at an artificially high price." Did you have any independent belief or reason to believe that that allegation was true, other than what counsel told you?

A No.

Q Did you conduct any investigation on your own to verify the truth of that assertion?

A No, I did not.

Q I would like to read to you paragraph 27 of Deposition Exhibit 1. "In addition, upon information and belief, for several years continuing to the present time, Hartmarx, Hart, Schaffner and Marx, Hickey-Freeman and the [19] other exclusive retailer agent co-conspirators have combined, conspired, and agreed with one another to fix prices and eliminate competition in the sale of Hart, Schaffner and Marx and Hickey-Freeman suits and to otherwise restrain trade in the sale of better men's suits." I again ask you, Mr. Dashtara, did you have any independent basis for subscribing to the truth of that allegation, other than what counsel told you?

A No, I didn't.

Q Did you conduct any independent investigation into that allegation before subscribing to the affidavit?

A No.

Q If I went through this Complaint paragraph by paragraph—

MR. COOTER: Good.

BY MR. FAVRETTO:

Q —and asked you the same questions—

A Yes.

Q —would your answers be the same in every instance?

A Yes. I mean, it depends.

MR. COOTER: Strike that. To save time, let's go off the record.

[20] MR. FAVRETTO: No, she can't—

MR. COOTER: What do you mean, she can't go off the record? She can go off the record if you let her go off the record. Do you want to let her go off the record to save time? I would be happy to clear this up for you.

MR. FAVRETTO: Off the record.

(Discussion off the record.)

MR. FAVRETTO: Would the reporter read back the previous question.

(Whereupon, the record was read back by the reporter.)

BY MR. FAVRETTO:

Q Let's ask the question again. Mr. Dashtara, if I went through this Complaint paragraph by paragraph and asked you the same question, namely, whether or not you had any independent basis for verifying the truth of the allegations made, other than what you received from counsel, would your answer be the same?

A Yes.

Q Am I correct in understanding, then, that with respect to this Complaint you have no independent knowledge of the truth or accuracy of the allegations except what was [21] told to you by counsel; is that correct, sir?

A Yes.

MR. FAVRETTO: Your witness, counsel.

MR. COOTER: No questions. He waives.

(By stipulation of counsel, in the presence of the witness, reading and signature waived.)

(Thereupon, at 1:30 p.m., the above proceedings concluded.)

(Certificate of Notary Public Omitted in Printing)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(Title Omitted in Printing)

Courtroom No. 21
Washington, D.C.

Friday, June 15, 1984

The above-entitled matter came on for a Rule 1 Motion before The Honorable Oliver Gasch, United States District Judge, at 2:02 p.m.

[2] PROCEEDINGS

THE DEPUTY CLERK: Civil Action No. 83-3568, Danik versus Hartmarx Corporation, et al. Mr. Cooter and Mr. Kudon represent the plaintiff; Mr. Ryan, Mr. Gary and Mr. Favretto represent the defendants.

THE COURT: I think you're a little bit off on that. It's Mr. Favretto represents the counter-defendant, plaintiffs and counter-defendant.

It's your motion, Mr. Favretto.

At the outset, I will state for the record, that I read Mr. Cooter's letter suggesting the Court recuse. I take it as a motion. It's denied.

MR. FAVRETTO: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. FAVRETTO: In Civil Action 83-3568, which is one of three cases involving the parties, Danik, Inc. and various Hartmarx subsidiaries, I do represent the defendants. In that class action, Your Honor, Danik is the plaintiff, and Hartmarx Corporation, Hickey-Freeman Company, Inc., and Hart Schaffner & Marx are the defendants.

The case was a class action complaint filed on November 29, 1983, alleging a variety of antitrust violations

against the defendants, including resale price maintenance, boycotts, territorial restrictions, all based upon some type of exclusive retailer policy. I will address those [3] allegations in the course of my argument, Your Honor.

Today we are before the Court on the motion of the defendants, Hartmarx and the two Hartmarx subsidiaries, for sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure.

This case we are discussing today, Your Honor, by the way, was dismissed by the plaintiff voluntarily on April 30th, 1984, five months after the commencement of the action, and after the defendants had filed a motion to dismiss and the Rule 11 motion, as well as after a reply had been made to those motions by the plaintiffs, and a response to those replies had been filed by the defendants.

The issue before us today, Your Honor, involves Rule 11 of the Federal Rules of Civil Procedure. The question is really one which deals with what efforts are required of counsel and of parties in Federal actions, to determine the merits of potential lawsuits before complaints are filed in Federal District Court. Reasonable efforts, Your Honor, are mandated by Rule 11. The plaintiff or the moving party in any proceeding in a Federal Court must satisfy himself or itself by reasonable efforts and by a reasonable inquiry that the pleading they file is well grounded in fact and warranted by existing law or a good faith argument for the extension of existing law.

Rule 11 was amended in August of 1983 to provide [4] for very specific obligations on the parts of attorneys practicing before the Federal Court, and I quote, just briefly, Your Honor, from the Rule:

> "The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry"—those words were added in the August 1983 amendments—"it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."

Upon a finding by the Court that Rule 11 has been violated, that this obligation imposed by Rule 11 has not been satisfied, the Rule provides that:

> "the court shall impose"—and I underscore the word "shall," Your Honor—"upon the person who signed the pleading, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because [5] of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee."

Our position today, Your Honor, on behalf of the Hartmarx defendants is simply that if there is ever a case where Rule 11 sanctions are warranted, and where a demonstration has been made that Rule 11 has been violated, it is the case before Your Honor today.

The 1983 amendments to Rule 11, as I indicated, Your Honor, revised the language of the Rule to emphasize the responsibilities of attorneys. No longer is it necessary to prove that the Rule was willfully or intentionally violated. The standard is simply reasonableness under the circumstances.

The Rule imposes an affirmative duty on a lawyer—and a lawyer cannot simply rely upon his client—of conducting a pre-filing inquiry into the facts and law underlying the complaint that he files. The belief of a lawyer that his cause of action is well grounded in fact and law must be formed after a reasonable inquiry. Bad faith is not the test. Subjective intent is not the test. The

objective reasonableness of the pre-filing inquiry is the sole test.

The courts have applied this Rule in this fashion, and in preparing for this argument today, I found a recent case in April of 1984 from the Southern District of New York, District Judge Knapp, which I think best summarizes the [6] standard under the new amendments to Rule 11. The case I'm going to quote from, Your Honor, is available on Lexis, and it's Wells versus Oppenheimer & Company, Inc., et al. In that case, Judge Knapp was faced with whether or not Rule 11 had been violated by the defendants in filing a motion for summary judgment. The judge denied the motion for summary judgment, finding that there was—there were disputed issues of fact clearly reflected in the deposition transcripts, and the plaintiff then filed a Rule 11 motion to retrieve or recapture the costs of responding to defendants' summary judgment motion.

I now quote from the Court's opinion:

> "In opposing plaintiffs' consequent motion for attorney's fees, defendants' counsel have gone to great lengths in describing their research and their reasons for believing their motion to have been valid. Having no reason to doubt the veracity of counsel, we must conclude that they acted in subjective good faith in bringing the motion.
>
> "The question therefore presented under Rule 11 is: must there be a finding of subjective bad faith before sanctions may be applied? It seems to us that the question answers itself. Given the nature of advocacy, it would be well nigh impossible ever to establish that an advocate acted [7] in subjective bad faith.' If that were the criteria, the Rule might as well be repealed.
>
> "We think, therefore, that the Rule must mean that the Court may impose sanctions where it finds that there is no objective basis for an attorney's belief that a motion"—in that case, a summary judgment motion—"is 'well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.' "

In that case, Judge Knapp went on to find that there was no such basis, and accordingly granted the plaintiffs' motion for sanctions; I should add, in the interest of completeness, reserving the full amount of the fees to be awarded on the sanctions motion until the end of the action that was before the judge. In this case Your Honor would not have that concern, because this action has come to an end as a result of the dismissal voluntarily entered by the plaintiff on April 30th.

One further observation about Rule 11 before entering into the argument of its application to this case, Your Honor, is that while the standard for a violation is an objective standard under the new Rule, in imposing sanctions, the advisory committee notes to the Rule—and I would refer the Court to those advisory committee notes, [8] because I think they are a very good synopsis of what the revisions were intended to accomplish last August in 1983—the advisory committee notes indicate that in imposing sanctions, the Court should take the actual or presumed knowledge of the attorney into account at the time that the attorney signed the complaint. So in imposing sanctions, the Court—it's a discretionary matter. The Rule provides that the Court shall impose sanctions once the Court is satisfied that a violation has occurred, but the amount, the nature, the severity of the sanctions are, of course, within the Court's discretion, and in reaching that determination, the Court can take all factors into consideration.

Our case, Your Honor, we believe fits well within the standards, and is a very appropriate one for sanctions. Your Honor is familiar with the background of the litigation between the parties before you. It started in June of 1983 as a collection action, which was met by a counter-

claim in that action by Danik, and one of the principals of Danik.

In November, the plaintiff, Danik, approached attorneys for Intercontinental, which is another Hartmarx subsidiary, and indicated that they were prepared to file two class actions, one involving a Robinson-Patman Act claim, similar to the one in the Intercontinental case, and the other one, the case which is before Your Honor today. After some discussion, plaintiff did carry through and filed those two [9] class actions. Both class actions were dismissed on April 30th, 1984.

The record in this case, Your Honor, is unusually complete for a motion of this sort. The Court has before it the briefs on the legal merits, the deposition of the president of Danik, who signed and verified the complaint in this case, the lawyers' affidavits from the plaintiff, that describe the extent of the investigation they conducted before filing the complaint. We rest on that record, Your Honor. We think it's unusually complete in a situation of this sort, and we think it speaks for itself.

If there's one document in the file before the Court that we could refer the Court to, we would refer the Court to the reply memorandum filed by the defendants, the Hartmarx defendants, on April 9, 1984, summarizing our belief and our position as to why Rule 11 was violated in this case. That reply memorandum was filed after we had had an opportunity to see the extent of the investigation conducted by the plaintiff before they filed this case.

Now, the class action invoves, in general terms, Your Honor, sweeping nation-wide antitrust allegations: price fixing, territorial restrictions, group boycotts, and other unspecified acts of monopoly, and other anticompetitive activities.

All of those allegations in the class action [10] complaint refers to as "an exclusive retailer policy." The defendants are charged with having an exclusive retailer policy, which is defined in the complaint as a policy of

selling their Hart Schaffner & Marx and Hickey-Freeman branded suits to only one retailer in every major metropolitan area. That is the fundamental factual allegation in the complaint. All other allegations are alleged to flow from that factual allegation, and are no more than conclusions.

The exclusive retailer policy allegation is repeated no less than 20 times in the class action complaint. Stripping everything away from the complaint, the essential assertion and the essential dispute, if you will, which the plaintiff seemed to have with the Hartmarx Corporation and its two subsidiaries sued in this case were that Hartmarx would not sell its Hickey-Freeman suits and its Hart Schaffner & Marx suits to the plaintiff. They continued to complain throughout that complaint, and it was made clear in their papers filed in this case thereafter, that that was their fundamental concern, that we would not deal with them. Of course, under the antitrust laws, a company has an absolute right to deal with whomever it pleases.

This fundamental complaint and its fundamental assertion led to a class action allegation in the complaint that was filed, which included allegations of resale [11] price maintenance, and as I said, boycotts and territorial restrictions, among others. Also filed with the complaint was a motion for class certification, and voluminous papers seeking to justify the plaintiff bringing this case as a class action on behalf of all other retailers nationwide who did not buy Hart Schaffner & Mark and Hickey-Freeman suits from the defendants.

After the complaint was filed in late November of '83, we conducted our investigation with our client, and we moved to dismiss on January 27, 1984 on the following grounds: number one, and most fundamentally, the defendants in this case do not have and did not have at the time and never have had an exclusive retailer policy, as alleged in the complaint. We sold ourt Hart Schaffner & Marx suits and our Hickey-Freeman suits to hundreds of

retailers throughout the country. We filed sworn affidavits by our executives attesting to this fact. We have multiple retailers in most metropolitan areas. We also filed sworn affidavits which attested to that fact as well.

Moreover, we argued that we had a legal right to deal with whomever we pleased, that the conclusory allegations of boycott and price fixing were unsupported by any factual assertions beyond the exclusive retailer assertion.

Moreover, we argued that exclusivity, even if we had such a policy—and we did not—was valid under existing [12] precedent, and perfectly valid under the antitrust laws.

Lastly, we argued that the plaintiff had no standing as a competing retailer, who had never been a customer of ours for the suits in question, to complain about resale price maintenance, because if there was a conspiracy that kept the prices of competing suits higher in the marketplace, the plaintiff could only profit from such a conspiracy, because he would be free to sell his suits below the fixed price.

The flimsiness and lack of basis in the complaint caused us, Your Honor, to file a Rule 11 motion. We filed it immediately after we fined our motion to dismiss, approximately five to six days later, in early February, 1984. I think it was February 2nd, 1984, to be exact.

We couldn't understand what could lead the plaintiff to make these allegations, which had no apparent basis in fact, and had no apparent basis in law. We sought to make inquiry of the president of the company who had verified the complaint by sworn affidavit. That deposition, after some objection and resistance from the plaintiff, was taken approximately a month after we filed our motion on February 29.

The President of Danik M. John Dashtara. He is a 90 percent owner and founder of the company. He swore in an affidavit attached to the class action complaint that

the [13] allegations were true and correct to the best of his information and belief.

I would recommend the reading of Mr. Dashtara's deposition to Your Honor. It's only a 20-page deposition, a 21-page deposition. Mr. Dashtara told me, much to my amazement, that he knew nothing whatever about the allegations in the complaint, which could have been derived from any independent investigation. Simply stated, he made no independent investigation. He relied upon what his lawyers told him. I was left with a question in my own mind, why he had verified the complaint in the first place.

In any event, shortly before we took Mr. Dashtara's deposition, the plaintiff responded with his answer to our Rule 11 motion and to our motion to dismiss. That response attached to it four affidavits, three from lawyers in the firm representing the plaintiff, and one from a secretary in the firm.

The lawyers' affidavits proved our suspicion, and they established our right to sanctions. Nevertheless, Danik stood by its complaint and did not dismiss its complaint. It continued to press the allegations, which had been demonstrated to be baseless on the factual record.

Now, Your Honor, it was only after our reply to the Rule 11 motion, the brief I referred Your Honor to this morning earlier, that was filed on April 9, 1984, that made [14] our case as to why Rule 11 was violated in this proceeding, that the plaintiff voluntarily dismissed this suit on April 30th. They tried to walk away, Your Honor, but the damage had been done. If Rule 11 means anything, it means that the Court may properly reimburse litigants who have been put to the expense of answering a frivolous lawsuit which had no basis in fact, and which had not been adequately investigated.

Now, why was Rule 11 violated in this case? Simply stated, there was no reasonable inquiry by anyone into the allegations prior to the filing. The undisputed record,

the affidavits and Mr. Dashtara's deposition establishes this. There's no need to look any further.

One of the lawyer's affidavits was filed by Mr. Cooter, lead counsel for the plaintiff. Mr. Cooter conducted no investigation. He was told by his client that his client had been unable to buy Hickey-Freeman and Hart Schaffner & Marx suits, and that those suits were only sold by Raleighs within the District of Columbia. He left all filing investigation to his colleagues.

Mr. Cahill, a partner of Mr. Cooter's, undertook to conduct the investigation. He telephone a number of retainers in Baltimore, and the term "a number of" is used in his affidavit. Only one such retailer is identified in the affidavit.

He asked those retailers if they carried Hart [15] Schaffner & Marx suits. Only one of those retailers said that it did. This telephone call was made on or about November 4, 1983. That was the extent of Mr. Cahill's personal investigation, so far as his affidavit reveals.

Mrs. Reid, a secretary at the law firm, was asked by Mr. Cahill to call retail stores in Washington, D.C., New York City and Philadelphia, and to ask if they sold Hart Schaffner & Marx suits. Mrs. Reid called about eight retail outlets in the District of Columbia, and talked to unidentified salespeople at those stores. They advised her that they did not carry Hart Schaffner & Marx suits. Two of those retailers, again unidentified, told her that Raleighs was the only store they knew in D.C. that sold Hart Schaffner & Marx suits.

She called four retailers in New York City. Salespeople answered the phone at those stores, and said they didn't sell Hart Schaffner & Marx. One person told her that Wallach's, a store in New York, was the only store he knew of that sold Hart Schaffner & Marx suits.

In fact, Your Honor, there are three stores in New York City that sell Hart Schaffner & Marx, including Barney's, which is one of the largest retail locations on

the East Coast. There are 20 stores that sell Hickey-Freeman suits in New York City.

Mrs. Reid then called Philadelphia, and she called [16] four stores. One store was out of business, and she found out from her phone calls that only Wanamaker's sold Hart Schaffner & Marx suits in Philadelphia. In fact, there are seven Hart Schaffner & Marx retailers in Philadelphia, and three Hickey-Freeman retailers.

So the investigation conducted by the lawyers amounted to only one lawyer making one call, one series of calls to one city on one day; a secretary at the firm made a series of calls to three other cities. The only question asked was whether or not the stores contacted sold Hart Schaffner & Marx suits, and whether those stores knew of anybody else that sold Hart Schaffner & Marx suits.

No other questions were asked. No inquiry about price fixing, no inquiry about boycotts, no inquiry about territorial restrictions, no inquiry about whether these retailers had ever sold those suits and had been cut off, whether they had ever tried to buy those suits—no inquiry at all. Most importantly, no inquiry at all about Hickey-Freeman. The only inquiry was made about Hart Schaffner & Marx. Yet, they sued Hickey-Freeman Company as well as Hart Schaffner & Marx, but they never even asked a question about Hickey-Freeman. They did nothing, Your Honor. It boils down to that, they did nothing.

The important point from this inquiry—and it's revealed in the record by their own admission—is that, as [17] I said, there was no inquiry into Hickey-Freeman's policies, and there was no inquiry into the substantive allegations in the complaint: resale price maintenance, boycotts, and territorial restrictions.

Furthermore, Your Honor, there was no adequate inquiry into the class action allegations. They called retailers, anonymous retailers in four cities in the Northeast part of the country, and then they brought a class action complaint.

So we think on a number of different independent bases, the pre-filing investigation was lacking in reasonability, and doesn't meet the standards of Rule 11. No questions about Hickey-Freeman; no questions about substantive antitrust violations; and inadequate follow-up on class action allegations, which formed the basis for their class action suit.

On the basis of the investigation I've just described, Mr. Cooter and Mr. Cahill signed the complaint which initiated a class action, nation-wide antitrust case. Mr. Dashtara, the President of the plaintiff, verified the complaint, although he admitted he knew nothing from any independent source about the allegations in the complaint.

After we filed our motion to dismiss and the Rule 11 motion, laying all of this out about our policies, they did not withdraw the complaint. Instead, they sent [18] another one of their lawyers to the telephone to conduct additional inquiry. This inquiry is reflected in the affidavit of Nicholas Hantzes, H-A-N-T-Z-E-S, a colleague of Mr. Cooter's at the law firm representing the plaintiff. His affidavit makes very interesting reading as well, Your Honor, because as pitiful as his follow-up investigation was, when he called three retailers in Philadelphia, a number of retailers in Boston, and one retailer in Los Angeles, his investigation established by his own admission in the affidavit, that we did not have the exclusive retailer policy which they alleged in their complaint. He found that in Philadelphia, two retailers sold Hickey-Freeman suits; he found in Boston that three stores sold Hart Schaffner & Marx suits. Nevertheless, their complaint, which they stood by and attempted to defend in their response, charged an exclusive retailer policy, which meant only one retailer in every metropolitan area.

Now, Mr. Hantzes' affidavit of his post-filing investigation—and I should add to the Court that Rule 11 requires the pre-filing inquiry—to the extent that Mr. Hantzes conducted a post-filing inquiry, it's really beside the point

as to whether or not they violated Rule 11 by the nature of their pre-filing inquiry. But in any event, it's interesting, because the post-filing investigation conducted by Mr. Hantzes established in their own minds that [19] we didn't have the policy that they charged us with, and instead of withdrawing the complaint at that time, they concocted a confused and outlandish theory that said, along these lines, Your Honor: "Well, you may not sell to only one, but you only sell part of your line to one and part of your line to somebody else, and you only sell to Big and Tall Shops"—it was just a confused—in other words, Your Honor, we didn't sell to only one in every area, maybe we sold to more than one, but in their view, it wasn't enough. So that's what they came up with in response, and that's what they pressed upon the Court at that time.

Well, we replied in our Rule 11 reply, and we pulled these facts together for the Court, and it establishes that far from withdrawing when they should have withdrawn this complaint, when they proved themselves that we didn't have the policy that they charged us with, when they hadn't conducted any investigation whatever into the substantive allegations that they made, they pressed ahead in the face of our sworn affidavits, in the face of their own subsequent investigation. They withdrew the complaint only three weeks after we had filed our reply brief on the Rule 11 motion.

Now, the principle at stake, Your Honor, is that you don't make allegations in Federal Court without an adequate basis. That is especially true when you are already in litigation with the party you are going to proceed against.

[20] As I indicated at the beginning of my argument, we were already in litigation with these people over the collection action and over the Robinson-Patman Act counterclaim. They came to us and said that they had evidence of additional antitrust violations, and they threw the class action complaint which is the subject of this

motion on the table, and then they filed it two or three weeks later, after attempting to engage us in a settlement discussion.

Now, there may be nothing wrong in principle with someone wanting to resolve all disputes between the parties to litigation, but certainly, when you're in litigation, the standard of care which should be demanded of a party who is going to bring additional charges against you ought to be intensified, it ought to be heightened, and what we say is they did nothing, and that is revealed in their affidavits, and they filed this class action against us. It was a massive class action, and corporations must respond when someone hits them with an antitrust class action.

Very serious allegations. The case received publicity in the Washington Post and in trade journals, and it caused Hartmarx enormous expense. We had to file a motion to dismiss; we had to file a Rule 11 motion; we had to reply to the plaintiff's responses to those motions; we had to conduct our own investigation; we had to talk to the executives in the company, and it went on for five months. They can't walk [21] away, Your Honor. The harm is already done. The process has already been abused, and they have literally no defense.

We believe that the facts that are outlined in our papers, and which I have gone over today, warrant the imposition of substantial sanctions. The expense was great for the defendant. There was no cause for them to do this to us, absolutely none. The have now walked away, and they had no cause to bring it in the first place.

The standard is an objective one, Your Honor. Deterence is an important function of Rule 11, and we respectfully ask the Court to impose sanctions of substantial degree, and we would be ready in connection with that decision, if the Court should deem it appropriate, we would be ready to supply whatever information would be necessary to support the imposition of sanctions in this case, including attorney's fees. Thank you, Your Honor.

THE COURT: All right.

MR. COOTER: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. COOTER: Your Honor, for the record, I'm Dale Cooter on behalf of the plaintiff in this case, Danik, Inc., and I think I can respond to Mr. Favretto's rather impassioned plea for sanctions, simply by explaining in a basic fashion what happened here with respect to the course of the litigation chronologically, the course of the [22] discussions between Mr. Favretto's law firm and my law firm with respect to that ongoing litigation, the nature of the inquiry made, and last but not least, the truth of the allegation, because as we stand here, it be true. That's our position.

What they call this collection action which was commenced, at least in our view, never was a collection action. It is more likely or more accurately characterized as a major antitrust case involving millions of dollars in price discrimination.

My first contact with this piece of litigation as Mr. Favretto has described the litigation—and Mr. Favretto's law firm was pursuant to the Court's order, that counsel for Intercontinental in the other case meet with counsel for Danik, in an effort to determine what issues were really in the case, and to agree at least in partial form on what we all thought would be a reasonable schedule to complete the case.

I've already explained to the Court that in our initial view of the case, when the representatives of Danik came to us with t... claim, was that the allegation of pric... crimination was one that had to be investigated befo..e at least our law firm would undertake any serious discovery effort or put this defendant, Intercontinental, in the first case to any particular significant expense.

[23] So what we did was we met, I met in my office with Mr. Gary and Mr. Ryan, and I said, "What is this price discrimination all about? Are you doing it?" Mr. Gary informed me in no uncertain terms, "It did not hap-

pen. We're not doing it. It didn't happen." Frankly, Your Honor, I took him at his word at the time, and based on that conversation with Mr. Gary, we filed in the underlying case the most limited document production request available to us, to determine whether, in fact, it happened, and I told him at the time, "If it didn't happen, Mr. Gary, then we're not going to go forward with it. We'll see."

That discovery was nothing more than to pull the invoices from Intercontinental with respect to the underlying Robinson-Patman case, as to Danik, and to pull the identical invoices as to Raleighs and Syms, which we then believed to be in possession of a discriminatory pricing arrangement.

That investigation in Buffalo resulted in two findings: first, as to Raleighs, it didn't happen; Raleighs is getting overcharged more or less the same way we are. As to Syms, it happened beyond dispute. Invoices across the board for the same item, the same lot number, the same delivery time, the same everything, 20 percent less.

At the end of the first day of deposition, I said, "But Mr. Gary, you told me it didn't happen. Now, I've got these papers, and apparently it did happen." He said, "Oh, [24] no, I didn't say that. What I said was, it's not a violation."

Well, I know exactly what he said. He said what I've just suggested to the Court that he said. So at that point, I had discovered that Intercontinental was engaged in exactly the price discrimination that Mr. Dashtara told me it was.

Moreover, given—they resisted the production of some documents, notably, the Syms order sheets at that deposition, but it was fairly clear from the testimony of Mr. Hoffmann, the President of Intercontinental, that that was a discrimination which was taking place in every city that Syms did business in, which by our investigation was seven or eight. So at that point we knew that there was a substantial antitrust violation, and based on Mr. Hoffmann's testimony, we knew it to be without substantial defense, and indeed it continues to be without substantial defense.

In any event, we came back, moved to amend the complaint, did some more discovery, and that case has been ongoing, Your Honor is familiar with it, and I don't have to go through the chronology of it, but it would be fair to say that at that point, having in effect caught these folks doing exactly what John Dashtara said they were doing, having the documents to prove it, I began to pay increasing attention to Mr. Dashtara's claims with respect to antitrust violations by this Company and its parent and affiliates.

[25] Mr. Dashtara told me that he was unable to purchase Hart Schaffner & Marx brands, Hickey-Freeman brands, and that in fact there was only one retailer in the Washington area who could do that, and that was Raleighs. Moreover, Mr. Dashtara told me that it was his understanding that that was a nation-wide practice, and that the effect of the practice—as it turned out—I shouldn't be telling my opponents that I buy their goods—but I had recently gone to Raleighs and bought a Hickey-Freeman suit and Hart Schaffner & Marx suit, and I know what it cost, and it was artificially high. They told me it was artificially high, and I didn't need to be an economist to figure that out when they sent me the bill.

As a practical matter, then, the issue became that, given the fact that John Dashtara had been undeniably right once, and he says that there is still more antitrust violation, and given the fact that we knew at that point that Intercontinental was engaged in a substantial antitrust violation, the issue became whether or not he was injured by still other practices, predatory practices of this Company.

At that point we knew that Hartmarx was a major, probably the major manufacturer, when you take the whole Company together, of men's suits in this country. Our information was that it was 60 percent, 65 percent of the [26] market. I'm not clear if that's right or not,

but there was no doubt about it: a big manufacturer, they controlled huge numbers of designer lines, all of them that I ever heard of at that point, and with the significant piece of the market, and we knew that because we had their 10-K and their annual report, and it said in glowing terms, "We're a great big Company, and we control everything," in effect.

We then undertook to verify whether or not Mr. Dashtara's allegations were correct with respect to an exclusive retailer policy, and I instructed people in my law firm to call three or four major metropolitan areas. We didn't call Butte, Montana. I wanted to call New York, Philadelphia, the big ones, to determine if, in fact, that policy existed, and if it did, to reach reasonable conclusions, based on what we already knew with respect to whether it had antitrust impact.

Mr. Cahill called Baltimore—we called Baltimore, Philadelphia and New York. Baltimore Mr. Cahill already knew something about, 'cause he lived there, or did at one point. But he made the calls and concluded that there was one retailer in Baltimore that sold this stuff. In New York, our information from our calls to these retailers were there was one retailer in New York that sold this stuff, and in effect, buttressed our conclusion or buttressed what John Dashtara had told me, and again he had a track record at that [27] point. He'd been right once, to the effect that there was in effect an exclusive retailer policy by Hartmarx and its subsidiaries in those two lines of suits, and those two lines are major lines.

Based on that information, I concluded that there was a case, an antitrust case to be made on that issue. We made the relevant allegations. There was a 12(b) motion filed, and I'll proffer to the Court that, had that 12(b) motion been heard, the allegations were well pled, and it would have survived 12(b).

In any event, we made the allegations, and by the way, at that point in time, I consulted with an antitrust expert—I'm not an antitrust expert, I'm a litigator. I'll even tell you who he is. He was a former Chief of Litigation at the Federal Trade Commission, done substantial amounts of antitrust work, and I brought him in, and I said, "You tell me what this is, tell me what this is about. What do I have here?" He said, "You have two very substantial antitrust class actions, based on the information and the results of that investigation."

Based on our investigation, our conversations with Dashtara, our conversations with an expert, I concluded there was a sufficient basis to file that lawsuit, and we did.

The interesting and perhaps the most telling thing in this case is, though, that I didn't file it immediately. [28] What I did was draft it. We put it in the form at which it ultimately reached the Court, save for a modification or two, nothing substantial. It was substantially complete and in final form when I called the general counsel for Hartmarx in Chicago. Hartmarx at that point was not a party to any ongoing litigation, although Hartmarx was also to be represented—and I think his name was Stewart, Charles Stewart—by the Mayer, Brown & Platt firm. Mr. Stewart and I had a short conversation, and I said, "Mr. Stewart, I'm a lawyer in Washington, and we have uncovered what we believe to be substantial antitrust allegations concerning Hartmarx and several of its affiliates." Mr. Stewart said, "Tell me what the nature of those allegations is in broad brush form," and I did. I explained to him that there was one action which we said involved price discrimination in favor of Syms in every city where Syms did business, and that the second lawsuit was an allegation of a restrictive dealership policy, which resulted in artificial price maintenance by way of conspiracy and group boycott. I told him what it was.

I said, "Now, Mr. Stewart, before I file it, maybe it would be useful that we have a talk. Let's talk about it." Mr. Stewart said, "Fine." I told Mr. Stewart, and frankly, there's been a whole lot made of the fact that we

gave them advance notice of the suit, in terms of some evil or untoward [29] motive of ours. The motive of ours at that point was exactly what I told Mr. Stewart, and that was, "Mr. Stewart, here's what it is, here's what we think we have. Let's sit down and talk about it," so that if it not be so, presumably Mr. Stewart is going to call me back, and he's going to say, "But, Cooter, you've blown it. You're just completely incorrect on this issue."

I told Mr. Stewart that I would kindly send it to him, be happy to wait—I think it was a week or ten days—to hear from him, and he thanked me for my courtesy—he thanked me; he told me it was a courteous phone call—thanked me for my courtesy. We sent the documents up there to Mr. Stewart forthwith.

At the end of—strike that. Either that very day or the next day, I went to the Washington office of Mayer, Brown & Platt, and met with Mr. Gordon and Mr. Gary, and gave them copies of what I had given to Mr. Stewart, and said, "Gentlemen, here's what we think we have. Now, if we're going to talk, maybe we should talk."

Mr. Gary and Mr. Gordon didn't say anything at that meeting. I told them I would be happy to give them whatever time they needed to review that material, and we agreed on the same week to ten days with Mr. Gary and Mr. Gordon.

At the expiration of the time—it was either—I think it was Mark Gary who called me—one of the lawyers [30] from over there called me and said, "We need more time to look at this stuff." I said, "Fine. What do you need?" I think it was another week. I said, "Fine, you have another week, whatever you want. We'll sit and wait to hear from you."

At the expiration of that week, I received another call from Mr. Gary, saying that they wanted to talk.

I had a conversation with Mr. Gordon, whom I perceived to be Mr. Gary's superior at that time, with respect to whether or not they wanted to talk substantively, or whether they wanted to talk about a payment term on

what they kept saying in their papers was a collection case. I told Mr. Gordon I was not inclined or the purpose of those pleadings, both class actions, were not designed to serve as defenses for a 100,000-dollar claim. I had a lot more money than that in them, probably, at that point.

Mr. Gordon indicated to me he understood that, and that somebody would get back to me. They got back to me shortly, and told me that they had no interest in pursuing a discussion with me at the time, and I could go ahead and file my lawsuit, and I did.

Now, never in the course of any of those conversations, did any of those people say this didn't happen. I mean, they'd said that before. I'm not sure I would have believed them. But the point is that they never [31] said, "Wait a minute, we got 16 retailers in New York," or "We've got seven in Dallas," or whatever it is they filed later by way of affidavit. They never said that the exclusive retailer policy that we alleged was anything but a fact, and indeed, they knew that our most firsthand information, our best source of information would be in the Washington market, as opposed to elsewhere, we being here, whatever the investigation. Never did they say it didn't happen. In fact, in Washington, it's true, and it turns out, Raleighs is an exclusive dealer. They never said anything. They told me go ahead and file my lawsuit. I did what they asked me to do in that regard.

Now, what happened then was, they filed a 12(b)motion, as I recall it. There was a dispute about the timing of the thing, as I remember it, but they filed a 12(b) motion that said that the pleading was insuffcient to state a cause of action for all of those reasons that antitrust lawyers like to argue about, which always give me a headache. But that was—that's all they said. They didn't say it isn't so. They said it doesn't state a cause of action, as it says.

We had reviewed it. We thought it did. We did a bunch of research. We thought it did. We filed an opposition to that 12(b) motion. That motion was pending. I

assumed at that point that that was their position, that [32] the position wasn't that it didn't happen, that the position was that if it happened, it didn't state a cause of action, as we pled it.

Shortly thereafter, we get served with a Rule 11 motion, which is the motion which is before Your Honor, saying that in attaching affidavits they said they got 16 retailers in New York, and they've got 32 in Detroit or whatever that thing said, and frankly, I was surprised. I was surprised, a, that they'd filed the motion, and b, at the substance of the affidavits, because at that point—and we're three months into the case, long after I first talked to them—that's the first I ever heard that they alleged they had double digit retailers in New York. Never heard that before. Nobody ever said that.

At that point, I called my colleagues into my office, and I said, "You tell me how this could happen," thinks me. "I presume they're telling me the truth," thinks me at the time, although I had been stung once. My colleague said, "We made these calls. This is what we were told. This is what happened. That's the basis of our belief."

I said, "Well, then there is a dispute between the results of our investigation and what they say constitute the facts, and we're going to determine who's right," and so we did.

I asked Nick Hantzes to make an extensive review of [33] the situation in the markets that we talked about and additional markets, and to report back to me forthwith, because if in fact it didn't happen, I was prepared—frankly, I'm too busy to waste my time on cases that don't have merit. So never mind Rule 11, I just didn't have time to fool with it if it's wrong.

He came back to me and showed me documentary evidence that the allegations are, in substance, correct. What we found—if you go up to the Library of Congress, and you open the phone book to Detroit, you'll see a Yellow Page ad that says some company, "Exclusive retailer for Hickey-Freeman and Hart Schaffner & Marx." We discovered that in several places. I've seen three or four

of those ads in major cities. It says exclusive. It says just what it says.

The telephone calls that we made to still additional metropolitan areas led us to the conclusion—well, first of all, we couldn't tell from the affidavits that had been submitted in support of the Rule 11 motion, whether they were talking about retailers or outlets, whether one retailer was 16 stores or 16 retailers. I give them the benefit of the doubt. They must have been talking about 16 retailers, because any other thing would just mislead the Court. I can't seriously contend they were doing that, but you couldn't tell it from reading the affidavit.

What we found was that we would call the people in [34] the various metropolitan areas, and we'd say, "You have a Hart Schaffner & Marx suit?" "Yeah, about two of them. We have two of them. You can't really buy them here. If you really want to buy them, you go down the street to X, Y, Z store. They're the only people in town that carry a full line."

With respect to everything west of the Mississippi, we discovered that every more or less exclusive retailer west of the Mississippi is a Hartmarx sub. They buy retailers.

I shortly thereafter had occasion to go to San Francisco on business, and it was pure happenstance, but I'm standing there in the financial district, and I walk by a store with a gold plaque on the door, "The exclusive home of Hart Schaffner & Marx and Hickey-Freeman," or something to that effect. I don't even remember the name of the place. I was absolutely convinced at that point that the substance of the allegation with respect to an antitrust violation in the nature of a group boycott through this policy and a conspiracy to fix prices was substantially correct. I believed it then, I believe it today.

It's not a function of me coming into court and saying, "Judge, we made a reasonable investigation, but we made a mistake." I'm not saying that. I'm saying we made a reasonable investigation, and we were right in substance. [35] I will concede to Brother Favretto, that it is pos-

sible that there isn't one. What there is, apparently, is one that has the line, and a couple of others that have long and tall sizes, and a couple of others that have limited distribution, and the interesting thing about it, when you talk to the retailers, I'm told, is that the retailers are very candid to tell you, "Yea, we got a couple of those suits, but if you really want Hickey-Freeman, or you really want Hart Schaffner & Marx, you go down the street." They tell you that.

So our investigation in my view was not insubstantial at all, and in fact correct. We reached the proper factual conclusion, based on what I know today, and you can be sure that after this Rule 11 business came up, given the other problems that we've had in this case, that I was curious about it. I wanted to know if we were right, and indeed we are.

Now, the question then gets to be, "What did you dismiss for?" Frankly, Mr. Favretto would have the Court draw some connection between his Rule 11 motion and our dismissal. I'll tell you candidly, Judge Gasch, that it had nothing to do with that. We didn't care one whit about Rule 11 when it came to dismissal.

What happened was that the pending class actions, Robinson-Patman class action plus the class action as to [36] Hart Schaffner & Marx—I don't want to say pending class actions, they're a distraction, 'cause I don't mean that, but they got to be a distraction to the trial of the major case, the major underlying case where this thing all started, that being the Intercontinental Robinson-Patman Act case.

The Court set an abbreviated discovery schedule—I can't remember what—six weeks. We hadn't done any discovery at that point. We had 30 depositions to take. They had a corresponding 30—I don't remember the exact number, but I want to be accurate. We had a large number of depositions to take. They had a corresponding large number on the other side, and frankly, I'm a partner in a 12-lawyer law firm. The filing of pleadings and

responding to pleadings—I mean, in the basic case, we've got pleadings filed that are super thick. The other one was proceeding apace. We were awash with paper, and it simply got to be a distraction from actually getting down to business, and getting ready to try the underlying case.

Mr. Kudon had joined the firm at that point. He is an antitrust expert, and he convinced me that the practical thing to do in that circumstance was to nonsuit those cases without prejudice. As I stand here, if I ever find the time or energy, we may bring them again, because I think they're substantial, and I think they're correct.

In any event, given the practical problem we were [37] facing with these folks, we dismissed without prejudice, and the only reason we did that was just what I've just described to the Court. It had absolutely nothing to do with our view of the merits of their 12(b) motion, nor did it have anything to do with our view of the merits of their Rule 11 motion.

Now—

THE COURT: You knew all that at the time you filed it, didn't you?

MR. COOTER: Did what, Your Honor?

THE COURT: That you were confronted with the original suit.

MR. COOTER: I didn't—

THE COURT: And your counterclaim was an antitrust action?

MR. COOTER: I knew that, yes, sir. I had no idea at that point that the discovery schedule was going to be as tight as it was, to be candid with the Court. I think we had a discovery cut—I'm trying to remember what month this was, but I think we had a discovery cut-off—the Court ruled—

THE COURT: Today is the cut-off.

MR. COOTER: Is today the cut-off?

THE COURT: Yes, if it's not extended.

MR. COOTER: And this was 60 days ago. The Court [38] ruled on summary judgment. We had a relatively

short discovery time for this kind of a case. I didn't—the Hartmarx class action case had already been filed at that point. I never really appreciated what the nature of the discovery problem was going to be until the Court ruled on the Intercontinental motion for summary judgment. That's the first time we really knew.

THE COURT: That's just a little collection case.

MR. COOTER: What's that?

THE COURT: That's just a little collection case, as you characterized it.

MR. COOTER: Oh, I don't characterize it that way at all, sir.

THE COURT: I thought you did just a few minutes ago.

MR. COOTER: No, no, no, that's the characterization of my opponents. It's anything but a little collection case.

THE COURT: Dashtara ordered the goods, he got the goods, he sold the goods. These people want their money.

MR. COOTER: That's not my theory, it still isn't my theory.

So as a practical matter, it was one at the time—

THE COURT: You've read Bruce's Juices, haven't you?

MR. COOTER: I sure have.

[39] THE COURT: What does that tell you?

MR. COOTER: About?

THE COURT: Whether or not an antitrust claim is a defense to a collection case?

MR. COOTER: What Bruce's Juices tells me, Your Honor, is that an antitrust counterclaim is not used as a defense to a suit on an open account. That doesn't militate against the viability of an antitrust counterclaim in any fashion.

THE COURT: You can have your antitrust case. I denied the motion for summary judgment on that.

MR. COOTER: I understand.

THE COURT: But you got to pay for the merchandise you got.

MR. COOTER: Well that issue has already been determined at this point. We've posted the money. The money is in the Registry of the Court, the 108,000 or whatever it is.

Frankly, Your Honor, the fact that we posted the money should militate against the theory. I mean, it should be clear to everyone in the room now, I hope, that this Robinson-Patman case is in no way used to defeat a 108,000-dollar claim, because we already posted the $108,000, and we're anxious to go forward with that case. I could have settled that out at the first salvo, I suspect, if I wanted to do that. We're not interested in that. No indeed, it's [40] not a collection case.

In any event, that's why the class action that's before Your Honor was dismissed, and that's the only reason.

Now, what Mr. Favretto didn't give you was the case law on this issue, and there is some case law on this issue, and there's a substantial number—there are a substantial number of cases that come up by way of Rule 11 motion or 12(b) motion or summary judgment motion in antitrust cases, and the key case that really determines this—apparently, this is fairly common, for antitrust defendants to file these sorts of things, because they've got all the information. How do I know how many retailers they have, or the size of those?

THE COURT: What is this key case you're going to give me?

MR. COOTER: It's Poller versus Columbia Broadcasting System, 368 U.S. 464.

Poller came up in the context of the motion for summary judgment by an antitrust defendant short of discovery. In effect, what he said—what happened in Poller, was the same kind of thing. The filed a bunch of affidavits, saying we didn't do it, and the plaintiff, the antitrust plaintiff in that circumstance, has no mechanism to find out to a certainty, beyond the investigation that a reasonable plaintiff can do, to establish whether they're telling you the truth [41] or whether they're not tell-

ing you the truth. I mean, I've now reached the conclusion that their affidavits may not be entirely truthful, but in any event—

THE COURT: What were the facts in the Poller case? What was the cause of action?

MR. COOTER: It was an antitrust case.

THE COURT: Yes, I understand that, but the facts.

MR. COOTER: If the Court will bear with me just a moment.

It was a boycott. The—

THE COURT: Wait just a minute. The Reporter wants to change his paper.

(Brief pause in proceedings.)

THE COURT: If you'd like, I'll send for 368 U.S.

MR. COOTER: It's 360—

THE COURT: You just said 368.

MR. COOTER: I have the case here.

THE COURT: I'll send for the volume, if you wish.

MR. COOTER: Unless Your Honor wants it. I have it.

What it was, it was a Sherman case, a Sherman 1 case, apparently, that had to do with whether or not CBS in conspiracy with a radio station or television station, I guess in Milwaukee, had entered into a conspiracy to eliminate another radio or television station. CBS denied it, entered summary judgment based on some affidavits.

[42] The Court below entered the summary judgment, and when it got to the Supreme Court, the Supreme Court said, "We believe"—and I'm reading from the case at this point:

> "We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles,"—and this is the key part—"the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot.

> "Trial by"—a little farther down—"trial by affidavit is no substitute for trial by jury, which so long has been the hallmark of 'even-handed justice.' "

In effect—

THE COURT: In this case, I denied the motion for summary judgment in the antitrust case; isn't that right?

MR. COOTER: Not in this case, in the other case.

THE COURT: I'm talking about the case that's still pending.

MR. COOTER: The case that's still pending, you denied summary judgment, that's correct, sir.

THE COURT: All right.

MR. COOTER: But what we have in this case, that is, in the class action case which has been dismissed, about which they complained that we should be sanctioned under [43] Rule 11, what we have are them filing affidavits, saying I've got however many retailers in Detroit, or however many in New York, and saying that conclusively demonstrates the frivolity of the action.

The Supreme Court has ruled in Poller, at least with respect to antitrust cases—

THE COURT: That was not a Rule 11 case.

MR. COOTER: No, it was not; no, it was not, but the concept is the same.

THE COURT: The question before me, sir, is whether or not you made a reasonable investigation before you filed these suits.

MR. COOTER: That's correct, and the standard for that reasonable investigation in an antitrust claim is somewhat different, I suggest to the Court, than in some other cases, because when you allege conspiracy, when you allege—in complex issues, complex cases, the investigation that can be made is only what can reasonably be made. All of the documents, all of the invoices, all of the dealership arrangements, all of the agreements, all of everything that happens in that kind of case is peculiarly within the grasp of the defendant. I don't have access to their file cabinet until the case starts, so the

best we can do in that circumstance is to make a reasonable investigation to determine whether or not probable cause—you know, I hate to use that [44] term—exists to file the lawsuit. Does it look to be so, based on a reasonable investigation?

Based on the investigation that we made, at the time it looked to be so. Based on what we now know, it still looks to be so, so that the fact that they come in and file affidavits that say we didn't do it doesn't determine the issue. The issue is—I mean, it would be kind of an anomalous result for the Court to hold, you didn't make enough investigation to determine whether it be true, even though it's true, because if it's true, then it's true. If it be true—

THE COURT: That goes without saying. If it's true, it's true.

MR. COOTER: That's right, and if that's so, whatever investigation we made must have been adequate because we arrived at the right result.

Beyond that, we made the only investigation that any reasonable plaintiff's antitrust lawyer could make in that circumstance, and that is, you get on the phone, and you call some relevant markets, and you find out what's happened, and what's happened is exactly what we say has happened, so that in our view, that investigation more than passes muster.

There are some additional cases on this issue. Perington Wholesale versus Burger King—

THE COURT: Is that a Rule 11 case?

[45] MR. COOTER: I'm trying to recall, Your Honor. It has to do with pleading—yes, they speak to Rule 11. I can't remember if it came up in the context of a Rule 11 motion, but whatever they're talking about is a complaint that was pled on information and belief, and the Court reasoned that—

THE COURT: What's the citation of this case?

MR. COOTER: 631 F.2d 1369. It's a 1979 case out of the Tenth Circuit, and they ruled, following a Seventh

Circuit case, Carroll versus Morrison, 149 F.2d 404, a Seventh Circuit case, and what they rule was that in antitrust actions, where the proof is in the hands of the alleged conspirators—and then they cite Poller—allowing such pleading when the conduct complained of is otherwise fairly noticed—the question is did I fairly notice them—seems appropriate, so they found that pleading on information and belief—and that was just information and belief from the client—constituted a sufficient pleading in the context of an antitrust case.

Additionally, In re Mid-Atlantic Toyota Antitrust Litigation—this is—I think it's Judge Young's case in Baltimore; if the Court will bear with me a minute? Yes, it is, Judge Young's case in Baltimore, 525 F.Supp. 1265. It's a 1981 case. Judge Young—I can find the annotation in just a moment—

[46] THE COURT: This Burger King case you just gave me is 631 F.2d 1369; is that right?

MR. COOTER: Perington is 631 F.2d 1369, that's correct, Your Honor.

THE COURT: 631 F.2d?

MR. COOTER: Yes.

THE COURT: What was the date of that case?

MR. COOTER: A 1979 case.

THE COURT: Now, this case Judge Young handled in Baltimore—

MR. COOTER: 525 F.Supp. 1265, a 1981 case.

THE COURT: I'm a little bit confused about that. You've got a 1981 case that bears the citation and Volume 525 F.2d—

MR. COOTER: No, F.Supp. . . . It's a District Court case.

THE COURT: Oh, F.Supp., all right.

MR. COOTER: 1265 is the page.

This came up in the context of the 12(b) motion essentially filed by the antitrust defendant, to the effect that there had been an insufficient investigation, and the thing was obviously wrong, the complaint was obviously

wrong, and Judge Young found, consistent with the other cases, that in antitrust cases, a basic investigation is enough, and denied—strike that. It came up in connection with Rule 11. [47] Some of the defendants moved to dismiss the complaint for failure to comply with Rule 11, and the Court cited a number of cases to the effect that they should be stricken or dismissed only "when it appears beyond peradventure that it is a sham and false, and that its allegations are devoid of factual basis."

That had to do with dismissal of a complaint, but the test is the same with respect to compliance with Rule 11, be the remedy sanctions or dismissal. The test is whether or not there is a sufficient investigation.

In that case, Judge Young simply took an affidavit from one of the plaintiffs, which was the Deputy Attorney General of the State of Pennsylvania, to the effect that he was convinced, based on his investigation, that there be enough acts or conclusions to await discovery, because in the nature of an antitrust case you can never nail it down with certainty until the discovery is over, so—there's another one, Hughes Automotive—I mean, there are a lot of them.

THE COURT: Are they in your pleading?

MR. COOTER: I'm not clear whether these are or not, to be honest with you, Your Honor. We filed that opposition some time ago, and I'm really not clear, but in any event, it's the same thing. They cite Poller, Poller v. Supreme Court case, the key case which is supposed to determine what the standard is for review here, saying that in antitrust [48] cases, you do the best you can and await discovery. That's the effect of it.

I'll suggest we did enough, even if it wasn't an antitrust case, but in the context of the undisputed fact that the facts which would prove it to a certainty are exclusively in the hands of the defendants, not the plaintiffs, all the plaintiff can do is what he can do based on what he has, and what he has is access to the markets by way of telephone or inquiry, and access to public

documents, and that's it. The evidence, the real evidence, the hard evidence is peculiarly within the hands of the defendant, so Mr. Favretto's affidavits that he submitted, to the effect that he has some retailers here or there, don't change the fact that, based on our conversations, it appears that his affidavits—I'm not going to say they're untrue, I'm not going to say anybody committed perjury here, but they may be misleading, because if they've got 16, and 13 of them or 14 of them have two suits, then it seems to me as a practical matter that they've got—that they do have a policy of exclusivity in a given market, and if that be so, then our allegation is correct, and the only way to determine that is discovery.

Now that discovery, I was just commenting to my partner, Mr. Kudon, that I almost wish we hadn't dismissed it, so we could go ahead and take the discovery and prove it [49] to be true, and that would take care of this motion, but what we've done, we've done, and that will have to wait another day.

Now, Mr. Favretto makes a lot of the fact—and I, to be candid, don't understand the concept—that somehow John Dashtara is supposed to know what happens in Philadelphia or Boston or San Francisco with respect to this. The plain and simple fact of the matter is that John Dashtara comes in, he says, client to lawyer, "I have a problem. Here's what I understand the facts to be, here's what I understand my problem to be. What do I do?" The lawyer makes an investigation that seems to say what it says, and the results seem to be that Mr. Dashtara is correct, and then we have his deposition taken, and he says, "And what investigation did you make, Dashtara?" "I didn't do anything. I did what my lawyers told me to do."

The law firm made the investigation. He has every reason to believe what I tell him are the results of that investigation, and indeed, if that be so, then he has every reason to verify the complaint and go forward.

That is not only not uncommon, at least in my experience in dealing with clients in litigation, it's common. They come in and they say, "I have a problem. Here's what I think it is," and the lawyers investigate, and if the lawyers' investigation indicates that they have a cause of action, [50] that's when the suit gets filed. It doesn't get filed because the plaintiff says, "I've got this great case." It's because the lawyer makes an investigation and tells the plaintiff, "You have a case," and that's when the suit gets filed.

So this whole business about John Dashtara, and whether he should have made an independent investigation one way or another, over and above what we did, it seems to me, misses the point. The point is, was an investigation done, no matter who did it, and if it was done, was it reasonable under the circumstances, and in the context of this case, is it so, and I submit that it is so.

I didn't completely understand Mr. Favretto's comments that somehow I was remiss because I signed it and didn't make the telephone calls. I don't know what that means. I'm a partner in a law firm. It would be unusual for me in my position in that law firm to make the basic investigatory phone calls myself. Frankly, if I were going to do that, I'd have to fire a lot of people, because I wouldn't need them. That's why I hire people, to do that sort of thing. I got the impression Mr. Favretto was troubled that I didn't make the calls personally, and I signed the paper. It seems to me that I'm entitled to rely on the results of the investigation, whether I do it myself, or whether my colleagues do it, and I did just that, and I [51] think I'm entitled to do that.

The bottom line is, it seems to me, that Mr. Favretto toward the end of his argument said, you know, deterrence is a substantial function of Rule 11. That's exactly what that Rule is. It's deterrence. The question is, deterrence by whom and for what? It's designed to be deterrence by the Court for frivolous lawsuits, frivolous

pleadings, based on no investigation, no reasonable effort to find out if it's true, a scatter-gun approach, where you sue everybody in sight. That's the abuse it's designed to protect, to prevent.

It's not designed, anywhere that we can find, to protect substantial antitrust corporate defendants from having to defend antitrust class actions by saying, "We have all the information, and that action is frivolous," because if he's right, the deterrent effect it has is not on the filing of frivolous pleadings. The deterrent effect that it has, if Mr. Favretto's theory is correct, is on the filing of any antitrust class actions.

How are you ever going to do enough to figure out to a certainty, to any reasonable probability, that effect on individual class members, assuming a large class? the effect on disparate markets, assuming numerous markets across the country? The deterrent effect that Mr. Favretto's argument goes to isn't deterrent. It's not deterrence. It's [52] chilling. The effect of Mr. Favretto's pleading and the effect of a ruling by this Court in Mr. Favretto's favor and the favor of his clients on Rule 11 isn't to deter frivolous pleadings, it's to chill the next antitrust plaintiff's lawyer who makes an investigation, thinks he has a claim, but can't prove it because they've got all the documents.

What's going to happen, if that indeed be the purpose of this Rule, is that plaintiffs' lawyers aren't going to want to file any of these things, because it's not comfortable, Your Honor, for me to be standing here. I've never had a Rule 11 motion filed against me. It's not comfortable for me to be standing here having to justify why I did and when I did it. I suspect it would be as uncomfortable for the next plaintiff's lawyer who came along, and I'll suggest that the effect of that kind of a ruling is simply to chill plaintiffs' antitrust cases, and I'll suggest that that may not be unintentional, because apparently, if you look at the antitrust cases, it comes up all the time. It is not, apparently, from our reading, all

that unusual or unique to find the corporate defendant file a Rule 11 motion to try and, in effect, frighten the antitrust plaintiff and his lawyer from vigorous prosecution of the suit.

Whether this case be dismissed or whether it wasn't, that isn't what happened here. We're not frightened of the [53] Rule 11 motion. It did not result in that dismissal, but as a practical matter, that is the effect of such a ruling.

For all of those reasons, both for policy reasons and for reasons of practicality, and that is, that we did what could reasonably be done in the circumstance, would lead us to ask Your Honor to deny his motion.

THE COURT: All right. While you're still on your feet, today was the cut-off day for discovery in the antitrust case. As you know, we had an issue which I've resolved as far as this Court is concerned, and we want to conclude those depositions.

MR. COOTER: Yes, sir. I mean—

THE COURT: I want to give you a trial date.

MR. COOTER: All right.

THE COURT: How much time do you need to conclude your depositions?

MR. COOTER: I haven't been as involved in the discovery process in that case as others of my colleagues. My understanding is that there are substantial document—there are a substantial number of documents we still don't have.

THE COURT: You had approximately two weeks to go when your colleague, Mr. Kudon, came into court on the matters that he presented to me approximately two weeks ago. I'm not disposed to give much more than two weeks.

* * * *

[66] THE COURT: Very good.

MR. COOTER: Thank you, Your Honor.

THE COURT: Thank you.

Now, you may—I hope you can be brief.

MR. FAVRETTO: Your Honor, I will be brief in response.

Mr. Cooter, as is his custom, I'm afraid, has meandered through his argument, making reference to a lot of things which are not in the record before the Court.

Your Honor is correct. The sole issue on a Rule 11 motion pending in the class action case is whether or not a reasonable investigation was conducted by the plaintiff before they filed their complaint.

That record, which is contained—which is reflected in the affidavits of the lawyers representing the plaintiff, establishes that no investigation at all, none, was conducted with respect to one of the defendants they named in the case, Hickey-Freeman Company. No investigation at all.

The President of the plaintiff, Mr. Dashtara, testified in his deposition, which has been filed with the Court, taken on February 29th of this year, that he performed no investigation himself, and knew nothing about the complaint except what his lawyers told him.

[67] Now, we have Mr. Cooter telling us that this all started by Mr. Dashtara's hunch, I take it, that he was the target of an antitrust violation, another antitrust violation on the part of the defendants.

Thirdly, there was no investigation whatever, Your Honor, of price fixing, there was no investigation of boycott, and there was no investigation of territorial division. The only inquiry they made, as flimsy and as meager as it was, involved questions related to whether or not retailers in four cities sold Hart Schaffner & Marx suits. That was the extent of their investigation.

That is important, Your Honor. It is extremely important, because when they responded to our 12(b)(6) motion on February 27th, 1984, they admitted that an exclusive selling arrangement by itself would be perfectly legal, that it would only be unlawful if it was accompanied by or in furtherance of price fixing, boycotts, or other anti-competitive activities or violations, and I

would refer the Court to—I believe I am correct, Page 12, Footnote 3, I believe, in their response to our motion to dismiss in this case. So by their own admission, an exclusive retailing policy, even if it exists—and it does not—would not by itself violate the law, absent its being tied in to some other antitrust violation, and they never made any inquiry on those substantive violations.

[68] Also, Your Honor, there was no adequate examination as to the class allegations. We have cited a case in our Rule 11 papers, which indicates—which holds that you have to justify or satisfy yourself that your class allegations are adequately and soundly based upon a reasonable inquiry. They did not do that. They called four cities in the Northeast. Giving that investigation whatever presumption you want—and we don't think it's entitled to any—that did not acquit their responsibilities to investigate the class action allegations.

This case that is the subject of the Rule 11 motion has nothing to do with the Robinson-Patman Act allegations, or the price discrimination allegations filed against Intercontinental. The class action case against Hartmarx, Hickey-Freeman, and Hart Schaffner & Marx involves totally separate violations of the law, and has nothing whatever to do with Robinson-Patman Act violation, which is charged against us in the other case.

We filed a Rule 11 motion in the class action case involving the resale price maintenance and exclusive retailer allegations which are now before Your Honor.

Mr. Cooter had a sheaf of Xeroxed cases before him, and he went through them for Your Honor, and he relied principally on the Poller versus CBS case, I believe. That case is an antitrust case that deals with the standards to [69] apply when summary judgment on the merits is the subject of the motion. We are not in that posture here, Your Honor. The only question is, did they perform the reasonble investigation which is required of them under Rule 11?

None of the cases cited by Mr. Cooter, based on his description, had to do with Rule 11 or with that issue.

None of the cases, in any event, occurred after the 1983 amendments to Rule 11, which tightened up the responsibility of a lawyer under that section to conduct the reasonable inquiry.

The standard is simply reasonable under the circumstances. We ask the Court to look at what they said they did in their affidavits, and to look at what they charged us with, and to make that determination.

Mr. Cooter further said that the exclusive retailer policy which they charged us with exists. Well, it does not exist. By his own admission, it does not exist.

We filed affidavits to that effect. He never challenged the affidavits. We have an affidavit from his own lawyer, Mr. Hantzes, which indicates that he conducted an investigation after we filed our Rule 11 motion, and found that it did not exist. So whatever they are now certain of as existing, by their own admission it is not what they charged us with in the complaint. They knew that immediately upon [70] our filing the Rule 11 motion. They did not withdraw their complaint at that time.

Mr. Cooter also stated that the affidavit—the defendant's 12(b)(6) motion did not contest the factual accuracy of the allegations in this complaint. That is untrue. Our 12(b)(6) motion had the affidavits of executives from Hart Schaffner & Marx and Hickey-Freeman attached to it, and those affidavits quite clearly lay out the facts of our retailing policy, and those affidavits further make it quite clear that we're talking about retailers not outlets, as Mr. Cooter would lead this Court to believe, and I refer the Court to Paragraph 6 of the affidavit of Mr. Hickey and the affidavit of Mr. Davis, filed both with our motion to dismiss and with our Rule 11 motion.

In substance, Your Honor, the allegations were wrong, factually wrong. They are still wrong. Their own subsequent investigation demonstrates that they were wrong.

They conducted no inquiry at all about Hickey-Freeman, yet they sued us, and they sued Hickey-Freeman. They conducted no inquiry about price fixing.

They conducted no inquiry about boycotts. Yet they sued us for that.

They conducted a pitifully inadequate inquiry, and I would say no inquiry at all sufficient to base their class allegations on.

For all of those independent reasons, we believe that [70-A] Rule 11 has been violated in the extreme, and that we are entitled to sanctions. Thank you, Your Honor.

THE COURT: Thank you. Case submitted.

(At 3:58 p.m., the hearing was concluded.)

(Certificate of Reporter Omitted in Printing)

SUPREME COURT OF THE UNITED STATES

No. 98-275

COOTER & GELL,
Petitioner

v.

HARTMARX CORPORATION, *et al.*

ORDER ALLOWING CERTIORARI

Filed October 16, 1989

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted limited to Questions 1, 3 and 6 presented by the petition.

October 16, 1989